Supreme Court, U.S.
FILED

No. 10-355 SEP 13 2010

OFFICE OF THE CLERK

IN THE
# Supreme Court of the United States

PELLA CORPORATION AND
PELLA WINDOWS AND DOORS, INC.,

*Petitioners,*

v.

LEONARD E. SALTZMAN, KENT EUBANK, THOMAS RIVA,
AND WILLIAM AND NANCY EHORN,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## PETITION FOR WRIT OF CERTIORARI

JAMES A. O'NEAL
JOHN P. MANDLER
AARON D. VAN OORT
FAEGRE & BENSON LLP
2200 Wells Fargo Center
90 South Seventh St.
Minneapolis, MN 55402
(612) 201-2121

CHRISTOPHER LANDAU, P.C.
*Counsel of Record*
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000
*clandau@kirkland.com*

September 13, 2010

## QUESTIONS PRESENTED

1. Whether a court may certify an "issue" class under Rule 23(b)(3) to adjudicate discrete issues that will not establish liability for any claim.

2. Whether a court may certify an "issue" class under Rule 23(b)(2) to adjudicate discrete issues that will not result in final declaratory relief.

3. Whether a court may certify a nationwide class under Rule 23(b)(2) to pursue state-law claims without analyzing the underlying state laws to determine that they are consistent.

## RULE 29.6 DISCLOSURE STATEMENT

Petitioner Pella Corporation has no parent corporation, and no publicly held corporation owns 10% or more of its stock. Petitioner Pella Windows and Doors, Inc. is a wholly-owned subsidiary of Pella Corporation.

## TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... i

RULE 29.6 DISCLOSURE STATEMENT ..... ii

INTRODUCTION ..... 1

OPINIONS BELOW ..... 3

JURISDICTION ..... 3

PERTINENT RULE PROVISIONS ..... 4

STATEMENT OF THE CASE ..... 6

A. Background ..... 6

B. Proceedings Below ..... 7

REASONS FOR GRANTING THE WRIT ..... 15

I. A Court May Not Certify An "Issue Class" Under Rule 23(b)(3) To Adjudicate Discrete Issues That Will Not Establish Liability For Any Claim. .. 15

II. A Court May Not Certify An "Issue" Class Under Rule 23(b)(2) To Adjudicate Discrete Issues That Will Not Result In Final Declaratory Relief. .. 21

III. A Court May Not Certify A Nationwide Class Under Rule 23(b)(2) To Pursue State-Law Claims Without Analyzing The Underlying State Laws To Determine That They Are Consistent. ..... 25

CONCLUSION ..... 29

## APPENDIX CONTENTS

Seventh Circuit Opinion,
May 20, 2010 ..... 1a

Seventh Circuit Order denying rehearing,
June 14, 2010..... 12a

Defendants' Petition for Leave to Appeal Class Certification Order under Fed. R. Civ. P. 23(f),
June 26, 2009..... 14a

District Court Opinion and Order,
June 4, 2009..... 46a

First Amended Class Action Complaint,
November 8, 2006..... 85a

## TABLE OF AUTHORITIES

Page(s)

### Cases

*Aetna Life Ins. Co. v. Haworth*,
300 U.S. 227 (1937).....27, 28

*Alabama v. Blue Bird Body Co.*,
573 F.2d 309 (5th Cir. 1978) .....19

*Allison v. Citgo Petroleum Corp.*,
151 F.3d 402 (5th Cir. 1998) .....17, 18, 20

*Amchem Prods., Inc. v. Windsor*,
521 U.S. 591 (1997).....3, 15, 29

*Andrews v. AT&T Co.*,
95 F.3d 1014 (11th Cir. 1996) .....18, 26

*Bolin v. Sears Roebuck & Co.*,
231 F.3d 970 (5th Cir. 2000) .....24, 27

*Briehl v. General Motors Corp.*,
172 F.3d 623 (8th Cir. 1999) .....28

*Brown v. Kelly*,
609 F.3d 467 (2d Cir. 2010).....20

*Castano v. American Tobacco Co.*,
84 F.3d 745 (5th Cir. 1996) ...17, 18, 20, 21, 26

*Christ v. Beneficial Corp.*,
547 F.3d 1292 (11th Cir. 2008) .....24, 27

*Coghlan v. Wellcraft Marine Corp.*,
240 F.3d 449 (5th Cir. 2001) .....27

*Cole v. General Motors Corp.*,
484 F.3d 717 (5th Cir. 2007) .....28

*Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91 (2d Cir. 2007) ..... 20

*Ford Motor Co. v. Rice*, 726 So.2d 626 (Ala. 1998) ..... 28

*Gariety v. Grant Thornton, LLP*, 368 F.3d 356 (4th Cir. 2004) ..... 18

*Gasoline Prods. Co. v. Champlin Refining Co.*, 283 U.S. 494 (1931) ..... 19

*Gene & Gene LLC v. Biopay LLC*, 541 F.3d 318 (5th Cir. 2008) ..... 17

*Heffner v. Blue Cross & Blue Shield of Ala., Inc.*, 443 F.3d 1330 (11th Cir. 2006) ..... 24

*Hohider v. United Parcel Serv., Inc.*, 574 F.3d 169 (3d Cir. 2009) ..... 21

*In re American Med. Sys., Inc.*, 75 F.3d 1069 (6th Cir. 1996) ..... 26

*In re Asbestos School Litig.*, 789 F.2d 996 (3d Cir. 1986) ..... 26

*In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008) ..... 17

*In re Nassau County Strip Search Cases*, 461 F.3d 219 (2d Cir. 2006) ..... 20, 21

*In re St. Jude Med., Inc.*, 522 F.3d 836 (8th Cir. 2008 ..... 21

*Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999 (11th Cir. 1997) ..... 18

*Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718 (9th Cir. 2007) ..... 27

*McKenna v. First Horizon Home Loan Corp.*,
475 F.3d 418 (1st Cir. 2007) .....24

*Newton v.*
*Merrill Lynch, Pierce, Fenner & Smith, Inc.*,
259 F.3d 154 (3d Cir. 2001) .....16, 17

*O'Neil v. Simplicity, Inc.*,
574 F.3d 501 (8th Cir. 2009) .....28

*Regents of Univ. of Cal. v.*
*Credit Suisse First Boston (USA), Inc.*,
482 F.3d 372 (5th Cir. 2007) .....17

*Sandwich Chef of Tex., Inc. v.*
*Reliance Nat'l Indem. Ins. Co.*,
319 F.3d 205 (5th Cir. 2003) .....18

*Steering Committee v. Exxon Mobil Corp.*,
461 F.3d 598 (5th Cir. 2006) .....16, 17, 20

*Unger v. Amedisys Inc.*,
401 F.3d 316 (5th Cir. 2005) .....17

*Valentino v. Carter-Wallace, Inc.*,
97 F.3d 1227 (9th Cir. 1996) .....20

*Vega v. T-Mobile USA, Inc.*,
564 F.3d 1256 (11th Cir. 2009) .....15, 16, 17

*Walsh v. Ford Motor Co.*,
807 F.2d 1000 (D.C. Cir. 1986).....26, 27

*Zinser v. Accufix Research Inst., Inc.*,
253 F.3d 1180 (9th Cir. 2001) .....26

**Constitution, Statutes, and Rules**

15 U.S.C. § 2301 .....27

28 U.S.C. § 1254(1).....3

28 U.S.C. § 1332(d) ..... 8

28 U.S.C. § 2201 ..... 2, 12, 27

Fed. R. Civ. P. 23 ..... 1, 2, 3, 4, 6, 14, 16, 20, 22, 28

Fed. R. Civ. P. 23(a) ..... 4, 8, 15, 16

Fed. R. Civ. P. 23(a)(2) ..... 13

Fed. R. Civ. P. 23(b)(2) ... 1, 2, 8, 10, 12, 13, 14, 21, 22, 23, 24, 25, 27, 28

Fed. R. Civ. P. 23(b)(3) 1, 2, 8, 9, 12, 13, 15, 16, 17, 18, 19, 20, 21, 23, 24, 28

Fed. R. Civ. P. 23(c)(4) ..... 20

Fed. R. Civ. P. 23(f) ..... 12, 26

U.S. Const. amend. VII ..... 18

**Other Authorities**

Wright, Charles A. *et al.*,
*Federal Practice & Procedure* (3d ed. 2005) .. 22

## INTRODUCTION

Class actions seek to promote efficiency by allowing one or more representative plaintiffs to pursue claims on behalf of an entire class. But class actions are subject to abuse when a named plaintiff pursues claims that cannot be established on a classwide basis. Under these circumstances, class certification promotes inefficiency, as well as unfairness, by multiplying proceedings and allowing a named plaintiff to conjure up a ghost army of absent class members whose claims the named plaintiff—and his attorneys—have no right to pursue.

Rule 23 seeks to prevent such abuse by allowing certification only where the named plaintiff can establish liability or entitlement to relief on a classwide basis—*i.e.*, by proving his or her own individual claims, the named plaintiff also would prove the claims of absent class members. If absent class members must still pursue individual proceedings to establish liability or entitlement to final relief, class certification is unwarranted. Rule 23(b)(3) accomplishes this objective in opt-out classes by specifying that certification is warranted only when common issues "predominate" over individual issues. And Rule 23(b)(2) accomplishes this objective in non-opt-out classes by specifying that certification is warranted only when the named plaintiff seeks "final" injunctive or declaratory relief on behalf of the class as a whole. The upshot of both provisions is the same: a court cannot certify a class merely to litigate one or more discrete issues that will not establish liability or entitlement to final relief on a classwide basis.

The lower courts in this case missed this fundamental point, and thereby distorted Rule 23 and departed from the path other courts have followed in addressing these important class-action questions. The district court recognized that the named plaintiffs here cannot prove their state-law consumer-fraud claims on a classwide basis because certain issues (including the bedrock issue of causation) must be proved on an individual basis. The court nonetheless certified "issue" classes under both Rule 23(b)(2) and Rule 23(b)(3) that cannot establish liability or entitlement to final relief on a classwide basis, and thus will not eliminate the need for individual proceedings. And the Seventh Circuit affirmed certification of both the Rule 23(b)(2) and 23(b)(3) classes on the ground that it "makes good sense" to resolve particular discrete issues on a classwide basis "while leaving the remaining, claimant-specific issues to individual follow-on proceedings." App. 7a (internal quotation omitted).

The lower courts, moreover, exacerbated these errors by allowing certification of a nationwide "issue" class under Rule 23(b)(2) without analyzing the underlying substantive state laws to determine whether they are consistent. Until this case, it had been settled law for a generation that certification of a nationwide class to pursue state-law claims is *per se* impermissible without careful analysis of the underlying state laws to determine consistency. The federal Declaratory Judgment Act, 28 U.S.C. § 2201, provides no basis for bypassing such analysis; to the contrary, that Act simply creates a federal-law mechanism for the declaration of substantive rights, but does not itself create any such rights.

At the end of the day, this case underscores the wisdom of this Court's observation that "the rulemakers' prescriptions for class actions may be endangered by those who embrace Rule 23 too enthusiastically just as they are by those who approach the Rule with distaste." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 629 (1997) (internal quotation and brackets omitted). By endorsing the certification of "issue" classes that will not establish liability or entitlement to final relief on a classwide basis, the Seventh Circuit departed from the plain language of Rule 23 and stretched class certification beyond all bounds of principle and precedent. Because the decision below is incorrect, and fosters instability and confusion in an important area of the law, this Court should grant review.

## OPINIONS BELOW

The Seventh Circuit's opinion is reported at 606 F.3d 391 and reprinted in the Appendix ("App.") at 1-11a. The Seventh Circuit's unreported order denying rehearing is reprinted at App. 12-13a. The district court's opinion is reported at 257 F.R.D. 471 and reprinted at App. 46-84a.

## JURISDICTION

The Seventh Circuit issued its decision on May 20, 2010, and denied a timely rehearing petition on June 14, 2010. App. 1a, 12a. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

## PERTINENT RULE PROVISIONS

Rule 23 provides in relevant part:

**(a) Prerequisites.**

One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

**(b) Types of Class Actions.**

A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

**(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.**

* * *

(4) Particular Issues.

When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) Subclasses.

When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

Fed. R. Civ. P. 23.

## STATEMENT OF THE CASE

### A. Background

The case involves approximately six million aluminum-clad wood casement windows manufactured and sold by petitioners Pella Corporation and Pella Windows and Doors, Inc. (collectively Pella) across the Nation from 1991 until 2009. App. 1a, 19a, 21a. Although these windows were sold under the "ProLine" name, there were substantial changes over the years to the design of the windows and their recommended installation methods, maintenance requirements, and warranty.

Like other organic products, these wood windows may deteriorate as the result of any number of factors, including improper installation, when exposed to the elements. App. 7a, 21-22a, 30-31a, 61a, 80a. Pella provided a warranty on the windows, which was extended to ten years during the period at issue here, and in 2006 established a Service

Enhancement Program, which reimbursed distributors for labor costs associated with replacing windows under the warranty and partially subsidized the cost of replacing windows for five years after the warranty's expiration. App. 22a, 47a.

Respondents are individuals who own Pella aluminum-clad wood casement windows in their homes. Respondents Leonard E. Saltzman (who lives in Illinois), Kent Eubank (who lives in Iowa), and Thomas Riva (who lives in Florida), own Pella ProLine windows. App. 90-93a. Respondents William and Nancy Ehorn (who live in California) own Pella Architect, not ProLine, windows. App. 94a.[1]

### B. Proceedings Below

Respondents brought this nationwide class action in 2006, alleging that the Pella aluminum-clad wood casement windows in their homes are unreasonably susceptible to moisture penetration and deterioration, and hence defective. Respondents did not, however, bring product-defect claims; instead, respondents brought state-law consumer-fraud claims, alleging that Pella's failure to notify them of the alleged defect violated their rights under the consumer-fraud statutes of their various States. Although respondents' claims arise under state law, they properly invoked federal jurisdiction under the

---

[1] The complaint, as amended, included two other named plaintiffs, Lubo and Maria Hadjipetkov, who lived in New Jersey and owned Pella Architect, not ProLine, windows. App. 86a, 93a. They subsequently sought and were granted leave voluntarily to dismiss their claims.

Class Action Fairness Act, codified in relevant part at 28 U.S.C. § 1332(d), because this is a putative class action of more than 100 members in which the parties are at least minimally diverse and the amount in controversy exceeds $5 million. App. 87a.

Respondents thereafter moved for certification of several classes of owners of Pella ProLine casement windows, and the district court (Zagel, J., N.D. Ill.) granted the motion in relevant part. The court certified two separate and distinct classes: (1) an opt-out class seeking money damages under Rule 23(b)(3) under the consumer-fraud statutes of California, Florida, Illinois, Michigan, New Jersey, and New York consisting of those persons "whose windows have exhibited wood rot and who have replaced the affected windows," App. 51a, 84a, and (2) a nationwide non-opt-out class seeking declaratory relief under Rule 23(b)(2) consisting of those persons who owned "windows that have not manifested the alleged defect and [those persons] whose windows have some wood rot but have not yet been replaced," App. 51a, 83-84a.

With respect to the Rule 23(b)(3) class, the court held that respondents satisfied the threshold "commonality" requirement of Rule 23(a) based on the underlying question whether the Pella ProLine casement windows are defective. App. 58-61a. The court then declared that the commonality analysis of Rule 23(a) essentially satisfied the predominance requirement of Rule 23(b)(3). "Considerable overlap exists between the court's determination of commonality and a finding of predominance. A finding of commonality will likely satisfy a finding of predominance because, like commonality,

predominance is found where there exists a common nucleus of operative facts." App. 73-74a (internal quotation omitted).

The court conceded that respondents could not prove their consumer-fraud claims on a classwide basis, because those claims involved issues (like the bedrock issue of causation) that are inherently individualized. The court, however, dismissed causation as a "damages," as opposed to a "liability," issue. "It is clear that in many instances, inspection will be required, and individual inquiries will predominate. However, the fact that proving damages must be handled individually does not preclude certification on the issue of liability." App. 80a; *see also* App. 60a ("[T]he inquiry with regard to damages and causation is too individualized" for class adjudication); App. 61a ("I decline to certify a class for the issues of causation and damages."); App. 80-81a n.13 ("I agree that issues of causation are too individualized for class certification, and I have declined to certify a class on that issue."); App. 83a ("I am certifying the consumer fraud class as to the issue of liability only, and damages will be handled individually."). Because the court believed that it was carving at the joint by separating a determination of "liability" from "damages," the court further rejected Pella's argument that having different juries address different elements of liability (such as product defect and causation) would violate the Seventh Amendment's re-examination provision. App. 83a.

The court acknowledged that the consumer-fraud statutes of the various States differ, so that it was necessary to divide the Rule 23(b)(3) class into

different subclasses. App. 74-78a & n.12. Accordingly, the court certified subclasses for claims under California, Florida, Illinois, Michigan, New Jersey, and New York law. *See id.*; *see also* App. 51a, 84a.

With respect to the Rule 23(b)(2) class, the court held that non-opt-out certification was warranted because respondents sought only declaratory relief in the form of six "Declarations" regarding discrete issues.[2] None of the requested Declarations,

---

[2] The requested Declarations are as follows:

**Declaration I**: The Court finds that all Pella ProLine aluminum clad casement windows, manufactured from 1991 to present, have a defect in the aluminum cladding of the sash component that allows water to get behind the aluminum cladding resulting in premature rotting of the wood component of the sash which wood rot may progress to adjacent wood components. The rotting of the wood component may not be detectable until after the warranty provided by Pella has expired. The Court finds that this defect is material and requires disclosure to all of these windows.

**Declaration II**: In August of 2006 Pella initiated a Pella Service Enhancement Program to provide limited remediation of wood rot in ProLine aluminum clad casement windows manufactured from 1991 to 2003. All persons who owned structures containing ProLine casement windows manufactured from 1991 to 2003 were eligible for this program. Pella however did not disclose to the persons eligible either the existence of the enhancement of their warranties, the limited remediation available, or that the windows covered by the program were defective in material and workmanship when manufactured.

**Declaration III**: The Court finds that all Pella ProLine aluminum clad casement windows manufactured from 1991 to present have a defect in workmanship and material that allows water to penetrate behind the aluminum clad sash component of the window resulting in premature rotting of the wood component, which rot may progress to adjacent wood

components, and that the rotting of the wood component may not be detectable until after the existing warranty provided by Pella has expired. The Court declares that all persons who own structures containing Pella ProLine windows manufactured from 1991 to present are to be provided the best practicable notice of the defect, which cost shall be borne by Pella.

**Declaration IV**: In August of 2006 Pella initiated a Pella Service Enhancement Program to provide limited remediation of wood rot in ProLine transom, awning and casement windows manufactured from 1991 to 2003. Only persons who owned structures containing ProLine transom, awning and casement windows manufactured from 1991 to 2003 and who repeatedly complained to Pella were purportedly included in and eligible for this program. Because the Court has determined that all Pella ProLine aluminum clad casement windows manufactured from 1991 to present have a defect in workmanship and material that allows water to penetrate behind the aluminum clad sash component of the window resulting in premature rotting of the wood component against reasonable expectations, and because the Court has found that Pella knew of this defect when it first manufactured these windows, the Court finds that the Pella Service Enhancement Program is insufficient to remediate the defects know by Pella to exist. The Court therefore declares that Pella's existing warranty on ProLine aluminum clad casement windows, limited to ten years for this defect is invalid, and, as such that limitation is unenforceable. Pella shall provide notice to all persons covered by that warranty of the removal of this time limitation.

**Declaration V**: The Court declares that Pella shall re-audit and reassess all prior warranty claims, including claims previously denied in whole or in part, where the denial was based on warranty or on other grounds, of claims related to ProLine window wood rot, whether internally coded by Pella as 06 or similar.

**Declaration VI**: The Court declares that Pella shall establish an inspection program and protocol to be communicated to class members, which will require Pella to inspect, upon request, a class member's structure to determine whether wood rot is manifest. Any disputes over coverage shall be adjudicated by a

however, would entitle any class member to final relief. Indeed, as the district court noted, respondents themselves acknowledged that the Declarations "do not ask the court to presume causation in all individual instances, only to make a finding regarding the nature of the wood durability defect and its cause." App. 73a.

The district court did not, in analyzing certification of the proposed nationwide non-opt-out class under Rule 23(b)(2), analyze the underlying state laws under which their claims arose to determine consistency. Rather, the court apparently accepted respondents' argument that because they sought declaratory relief under the federal Declaratory Judgment Act, 28 U.S.C. § 2201, their claims arose under uniform federal law.

Pella timely sought review of the class certification order Fed. R. Civ. P. 23(f). *See* App. 14-45a. The Seventh Circuit called for a response to the petition, and then—without any additional briefing or oral argument—both granted the petition and affirmed the certification order. *See* App. 1-11a.

The Seventh Circuit affirmed certification of the Rule 23(b)(3) class on the ground that the issue of "defect" predominated, even though any individual plaintiff would still have to prove causation, so that liability could not be established on a classwide basis. "We ... hold that the district court properly ... exercised its discretion to conclude that the common

---

Special Master appointed by the Court and/or agreed to by the parties.

App. 48-50a n.3.

predominant *issue* of whether the windows suffer from a single, inherent design defect leading to wood rot is the *essence* of the dispute and is better resolved by class treatment." App. 5a (emphasis added). The appellate court noted with approval that "[t]he district court held that the commonality requirement of Rule 23(a)(2) and the predominance requirement of Rule 23(b)(3) are both satisfied because the *central* questions in the litigation are the same for all class members—whether the ProLine windows suffered from an inherent defect when they left the factory, whether and when Pella knew of this defect, the scope of Pella's warranty, and the nature of the ProLine Customer Enhancement Program and whether it amended the warranty." App. 6a.

The Seventh Circuit acknowledged that the causation inquiry in this case "is necessarily an individual issue." App. 7a; *see also id.* ("Under the district court's plan, class members still must prove individual issues of causation and damages."). The appellate court nonetheless asserted that "the need for individual proof alone does not necessarily preclude class certification." *Id.* "A district court has the discretion to split a case by certifying a class for some *issues*, but not others, or by certifying a class for liability alone where damages *or causation* may require individualized assessments." *Id.* (emphasis added). Like the district court, the Seventh Circuit dismissed Seventh Amendment concerns on the ground that the class jury would be asked to decide different issues than subsequent juries in individual cases. App. 9-10a.

The Seventh Circuit also affirmed certification of the nationwide non-opt-out Rule 23(b)(2) class of all

Pella ProLine window owners. App. 8-9a. The court noted that the Rule 23(b)(2) class seeks declaratory relief only, even though it does not seek (as the Rule requires) "final" relief; any individual plaintiff would still have to prove causation if and when a defect manifested itself. App. 8a. According to the Seventh Circuit, such persons (whose windows either had not manifested any defect or who had not replaced their windows) "would want declarations that there is an inherent design flaw, that the warranty extends to them and specific performance of the warranty to replace the windows when they manifest the defect, or final equitable relief." *Id.*

The Seventh Circuit did not address Pella's argument that the nationwide Rule 23(b)(2) class was inappropriate because the district court had not analyzed the underlying laws of the fifty States for consistency. Rather, the court apparently dismissed this argument as one of several "minor concerns that relate primarily to the manageability of the class." App. 10a. "Under Rule 23," the court declared, "district courts are permitted to devise imaginative solutions to problems created by the presence in a class action litigation of individual damages issues." *Id.* (internal quotation omitted).

The Seventh Circuit denied a subsequent petition for rehearing, *see* App. 12-13a, and this petition follows.

## REASONS FOR GRANTING THE WRIT

### I. A Court May Not Certify An "Issue Class" Under Rule 23(b)(3) To Adjudicate Discrete Issues That Will Not Establish Liability For Any Claim.

The Seventh Circuit erred, and intensified an existing conflict among the circuits, by holding that it was appropriate for the district court to certify an "issue" class under Rule 23(b)(3), even though resolution of the specified issues—the existence of an alleged design defect in Pella's ProLine casement windows, and Pella's response to that alleged defect—would not establish liability for respondents' consumer-fraud claims on a classwide basis. Under Rule 23(b)(3), the presence of one or more common issues is not enough to warrant class certification. To the contrary, such common issues must "*predominate* over any questions affecting only individual members," Fed. R. Civ. P. 23(b)(3) (emphasis added), and—as most circuits to have addressed the issue have held—common issues cannot "predominate" as a matter of law where, as here, one or more essential elements of liability (such as causation, injury, or reliance) must be proved on an individual basis in subsequent proceedings.

It is simply not true, as the district court held, that "[a] finding of commonality [under Rule 23(a)] will likely satisfy a finding of predominance" under Rule 23(b)(3). App. 73-74a. To the contrary, as this Court and others have explained, the predominance requirement "is far more demanding" than the commonality requirement. *Amchem*, 521 U.S. at 624; *see also Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1270, 1278-79 (11th Cir. 2009); *Steering*

*Committee v. Exxon Mobil Corp.*, 461 F.3d 598, 601-02 (5th Cir. 2006); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 187 (3d Cir. 2001). The existence of one or more common issues under Rule 23(a) is necessary, but not sufficient, to warrant class certification; the whole point of the predominance requirement of Rule 23(b)(3) is to ensure that classwide adjudication of a common issue or issues is worth the candle. *See* Advisory Committee's Notes on Fed. R. Civ. P. 23, 1966 amendments, Subdivision (b)(3) ("It is only where this predominance exists that economies can be achieved by means of the class-action device."). A court thus cannot "bootstrap" a finding of commonality under Rule 23(a) into a finding of predominance under Rule 23(b)(3). *See, e.g.*, *Vega*, 564 F.3d at 1277-79.

The district court in this case, however, did just that, and the Seventh Circuit blessed that decision. *See* App. 73-74a, 5-7a; *see also* App. 4a (noting that "the district court explicitly declined to certify issues related to causation, damages, and statute of limitations"); App. 6-7a (where there are "common issues," it "makes good sense ... to resolve those issues in one fell swoop while leaving the remaining, claimant-specific issues to individual follow-on proceedings") (internal quotation omitted). According to the Seventh Circuit, the district court properly concluded that "the common *predominant* issue" of design defect "is the *essence* of the dispute," and outweighed the individualized elements of the consumer-fraud claims (including causation) that every class member would need to prove to establish liability. App. 5a (emphasis added); *see also* App. 6a (asserting that "the *central* questions in the litigation

are the same for all class members") (emphasis added).

By endorsing such non-dispositive "issue" classes under Rule 23(b)(3), the Seventh Circuit gutted the "predominance" requirement and deepened a circuit conflict. As the Fifth Circuit has explained, the predominance requirement ensures that commonality governs *a claim as a whole*. *See, e.g.*, *Castano v. American Tobacco Co.*, 84 F.3d 745 n.21 (5th Cir. 1996) ("[A] cause of action, *as a whole*, must satisfy Rule 23(b)(3)'s predominance requirement.") (emphasis added); *see also Steering Committee*, 461 F.3d at 601 (same); *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 421-22 (5th Cir. 1998) (same). For most claims (including those at issue here), alleging that a defendant engaged in a common course of wrongdoing takes a plaintiff only so far; the plaintiff generally must prove additional elements of a claim (such as causation, injury, or reliance) to establish liability.

Where, as here, a plaintiff cannot prove all elements of liability on a classwide basis with classwide proof, then common issues cannot "predominate" in the claim *as a whole*. *See, e.g.*, *Newton*, 259 F.3d at 172 ("If proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable."); *see also Vega*, 564 F.3d at 1274; *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008); *Gene & Gene LLC v. Biopay LLC*, 541 F.3d 318, 326-27 (5th Cir. 2008); *Regents of Univ. of Cal. v. Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372, 393-94 (5th Cir. 2007); *Unger v. Amedisys Inc.*, 401 F.3d 316, 321-22 (5th Cir. 2005); *Gariety v.*

*Grant Thornton, LLP*, 368 F.3d 356, 362-63 (4th Cir. 2004); *Sandwich Chef of Tex., Inc. v. Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205, 218-19 (5th Cir. 2003); *Andrews v. AT&T Co.*, 95 F.3d 1014, 1023-24 (11th Cir. 1996). In all of these cases, in sharp contrast to this case, the plaintiffs' allegation that the defendant engaged in a common course of wrongdoing was insufficient as a matter of law to warrant certification limited to that discrete issue in light of the individualized nature of other elements of liability.

Indeed, allowing "issue" classes under Rule 23(b)(3), like the one certified below, would undermine the efficiency concerns that animate the Rule in the first place. If subsequent individual proceedings are necessary to establish liability, the utility of a class action is sharply limited. *See, e.g.*, *Allison*, 151 F.3d at 419-20; *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1006 & n.12 (11th Cir. 1997). Certification of an "issue" class to litigate only discrete elements of plaintiffs' claims does not *prevent* individual proceedings, but *guarantees* them.

Trying different elements of liability before different juries, moreover, raises serious Seventh Amendment problems. *See* U.S. Const. amend. VII ("[N]o fact tried by a jury shall be otherwise re-examined in any Court of the United States."). Because the various elements of a cause of action often turn on the same facts, a jury addressing one discrete element of liability may find facts differently than another jury addressing another discrete element of liability, in violation of that constitutional command. *See, e.g.*, *Allison*, 151 F.3d at 423-24 & n.21; *Castano*, 84 F.3d at 750-51 & n.30; *see*

*generally Gasoline Prods. Co. v. Champlin Refining Co.*, 283 U.S. 494, 500 (1931); *Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 318-19 (5th Cir. 1978).

This case underscores the point. A jury addressing causation in an individual proceeding would necessarily have to understand the alleged design defect to decide whether it caused the failure of a particular window, and therefore may re-examine facts relating to defect that were already tried to a class jury. A case involving comparative fault would present this problem even more starkly. It is common for plaintiffs to blame multiple parties (*e.g.*, manufacturers, builders, and contractors) for window failure. In comparative-fault jurisdictions, a jury would be required to assess the comparative fault of all responsible parties, which in turn would require the jury to re-examine the facts relating to defect that were already tried to a class jury, in violation of the Seventh Amendment.[3]

The Seventh Circuit's assertion that Rule 23(b)(3) gives a district court "the discretion to split a case by certifying a class for some issues, but not others," App. 7a, exacerbates a festering circuit conflict on the propriety of "issue" classes. Like the Seventh

---

[3] Both the district court and the Seventh Circuit dismissed the Seventh Amendment problem on the ground that the class jury would determine "liability," while an individual jury would determine "damages." App. 9-10a, 83a. Causation, however, is an element of liability, not damages. Regardless of whether it is generally permissible under the Seventh Amendment to "split" a case between liability and damages, *but see Blue Bird*, 573 F.2d at 318-19, the lower courts here impermissibly "split" this case between discrete elements of liability.

Circuit, the Second and Ninth Circuits have held that district courts may certify "issue" classes to adjudicate particular *elements* of claims, even if individualized issues preclude classwide adjudication of those claims *as a whole*. *See, e.g.*, *In re Nassau County Strip Search Cases*, 461 F.3d 219, 227 (2d Cir. 2006) (holding that class certification warranted to address defendant's conduct, regardless of individualized defenses); *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) ("Rule 23 authorizes the district court in appropriate cases to isolate the common issues ... and proceed with class treatment of these particular issues."); *cf. Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 109 (2d Cir. 2007) (noting that, in light of *Strip Search*, a district court could certify a class "to litigate the first element of [an] antitrust claim—the existence of a Sherman Act violation," regardless of whether other elements of such a claim are individualized); *Brown v. Kelly*, 609 F.3d 467, 483-85 (2d Cir. 2010) (same). These other circuits buttress their interpretation with Rule 23(c)(4), which authorizes certification "with respect to particular issues." Fed. R. Civ. P. 23(c)(4). *See Strip Search*, 461 F.3d at 227; *Valentino*, 97 F.3d at 1234.

As the Fifth Circuit has explained, however, Rule 23(c)(4) cannot reasonably be read to "eviscerate" the predominance requirement of Rule 23(b)(3) by allowing the certification of "issue" classes where, as here, common issues do not predominate in a claim *as a whole*. *Castano*, 84 F.3d at 745 n.21; *see also Steering Committee*, 461 F.3d at 601; *Allison*, 151 F.3d at 421-22. Rather, Rule 23(c)(4) "is a housekeeping rule that allows courts to sever the

common issues for a classwide trial" if and only if the undiluted predominance requirement of Rule 23(b)(3) is satisfied. *Castano*, 84 F.3d at 745 n.21.

The upshot is that this case highlights a circuit conflict on the propriety of certifying "issue" classes to resolve discrete elements of claims on a classwide basis where (as here) other elements of those claims concededly require individualized adjudication. *See, e.g.*, *Strip Search*, 461 F.3d at 226-27 (expressly disagreeing with the Fifth Circuit's ruling in *Castano* that "a cause of action, as a whole, must satisfy the predominance requirement of (b)(3)"); *Hohider v. United Parcel Serv., Inc.*, 574 F.3d 169, 200 n.25 (3d Cir. 2009) (noting that this issue "has generated divergent interpretations among the courts"); *In re St. Jude Med., Inc.*, 522 F.3d 836, 841 (8th Cir. 2008) (same). Given the ubiquitous role of class actions in our contemporary legal culture, the propriety of certifying discrete "issue" classes under Rule 23(b)(3) warrants this Court's review.

## II. A Court May Not Certify An "Issue" Class Under Rule 23(b)(2) To Adjudicate Discrete Issues That Will Not Result In Final Declaratory Relief.

The Seventh Circuit next erred, and created a conflict among the circuits, by holding that it was appropriate for the district court to certify a non-opt-out class under Rule 23(b)(2), even though that class cannot obtain final declaratory (or other) relief. Under the plain language of that provision, non-opt-out certification is warranted where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that *final* injunctive relief or *corresponding* declaratory

relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2) (emphasis added). "Declaratory relief 'corresponds' to injunctive relief when as a practical matter it affords injunctive relief or serves as a basis for later injunctive relief." Advisory Committee's Notes on Fed. R. Civ. P. 23, 1966 amendments, Subdivision (b)(2); *see also* Charles A. Wright *et al.*, *Federal Practice & Procedure* § 1775 (3d ed. 2005) (to be "corresponding," "the declaration should be equivalent to an injunction"). Thus, whether a plaintiff seeks injunctive or declaratory relief, certification under Rule 23(b)(2) is warranted only where the plaintiff seeks *final* relief.

The district court nonetheless certified a non-opt-out class seeking declaratory relief under Rule 23(b)(2) while acknowledging that the class could not obtain—and indeed did not seek—any final relief. As the court pointed out, the various Declarations sought by respondents, *see supra* n.2, "do not ask the court to presume causation in all individual instances, only to make a finding regarding the nature of the wood durability defect and its cause." App. 73a. In other words, a declaration regarding a "defect" would not establish liability for any particular claim, and individual proceedings would still be necessary for any class member to obtain any final relief—whether injunctive or monetary in nature. The Seventh Circuit endorsed the district court's analysis, expressly rejecting Pella's argument that "the class does not seek *final* injunctive relief as the rule requires." App. 8a (emphasis in original). It suffices, the Seventh Circuit held, that class members would benefit from certain declarations

regarding discrete elements of their claims. *See* App. 8-9a.[4]

That holding cannot be squared with Rule 23(b)(2) or cases from other circuits applying that provision. The point here is essentially the same as the point made above with respect to Rule 23(b)(3): a class action is not an appropriate device for adjudicating discrete legal issues that will then require individual adjudication by each class member to establish liability or obtain any relief. Rule 23(b)(3) makes the point through its "predominance" requirement; Rule 23(b)(2) makes the point through its "final" relief requirement. Where, as here, common issues do not "predominate" so that class certification is inappropriate under Rule 23(b)(3), plaintiffs cannot simply turn to Rule 23(b)(2) to pursue similarly non-final declaratory relief regarding one or more discrete elements of their claims.

Given the plain language of Rule 23(b)(2), it is hardly surprising that the First, Fifth, and Eleventh

---

[4] The Seventh Circuit also suggested that "the cumulative effect" of the Declarations for class members "will be an entitlement to have their windows replaced." App. 9a. As the district court recognized, that suggestion is incorrect, because the Declarations do not purport to resolve individual liability issues, including the bedrock issue of causation. App. 73a. Indeed, as the district court pointed out, plaintiffs themselves disavowed any suggestion that the Declarations would resolve causation in individual cases. *See id.* Thus, even if the Declarations were granted, each class member would still have to prove that any moisture-related damage was caused by the declared defect, as opposed to some other factor like improper window installation.

Circuits have expressly rejected the certification of "issue" classes seeking non-final declaratory relief under Rule 23(b)(2). *See Christ v. Beneficial Corp.*, 547 F.3d 1292, 1298 & n.11 (11th Cir. 2008); *McKenna v. First Horizon Home Loan Corp.*, 475 F.3d 418, 426-27 (1st Cir. 2007); *Heffner v. Blue Cross & Blue Shield of Ala., Inc.*, 443 F.3d 1330, 1344-45 (11th Cir. 2006); *Bolin v. Sears Roebuck & Co.*, 231 F.3d 970, 977-79 & n.39 (5th Cir. 2000). In those cases, as here, the requested declaratory relief would not resolve any class member's claim—rather, each class member still would need to initiate follow-on proceedings to adjudicate individualized liability issues. This, of course, would undermine the very "judicial economy and efficiency" that are "[a]mong the primary rationales behind the class action mechanism." *McKenna*, 475 F.3d at 427. A Rule 23(b)(2) class, in other words, cannot serve merely as a stepping-stone to subsequent individual proceedings, but must resolve the parties' rights. *See, e.g., id.* at 422 (rejecting certification of class "aimed at clearing the way for [individual] rescission claims").

It is hard to overstate the practical implications of the Seventh Circuit's cavalier approach toward certification of "issue" classes for non-final declaratory relief under Rule 23(b)(2). As this case shows, a plaintiff can virtually always allege a common course of wrongdoing. If such an allegation alone were sufficient to warrant certification of a non-opt-out class seeking declaratory relief with respect to that single issue, then such declaratory "issue" classes could be certified in virtually every case. The fact that Rule 23(b)(2), in sharp contrast to Rule 23(b)(3), does not require the court to provide

absent class members with either notice or an opportunity to opt out of the class only heightens the problem. The decision below opens the door for classwide declaratory adjudication of discrete elements of potential individual claims for money damages without any notice to absent class members. Neither the Rule nor due process tolerates that result.

## III. A Court May Not Certify A Nationwide Class Under Rule 23(b)(2) To Pursue State-Law Claims Without Analyzing The Underlying State Laws To Determine That They Are Consistent.

Finally, the Seventh Circuit erred, and strayed from the well-worn path followed by other circuits, by affirming the district court's certification of a nationwide class under Rule 23(b)(2) to pursue state-law claims without analyzing the underlying state laws to determine that they are consistent. Under that provision, class certification is warranted only where final injunctive or declaratory relief is warranted for "the class as a whole." Fed. R. Civ. P. 23(b)(2). Needless to say, a court cannot determine whether relief is warranted for a nationwide class "as a whole," *id.*, without analyzing each of the laws alleged to provide the basis for such relief to determine that they provide a consistent basis for classwide relief.

The district court, however, engaged in no such analysis before certifying the nationwide Rule 23(b)(2) class in this case. Indeed, the court's cursory analysis of the Rule 23(b)(2) class addresses only the Rule's first requirement—"the party opposing the class has acted ... on grounds that apply generally to

the class"—and does not address the Rule's second requirement that "the class as a whole" must be entitled to final injunctive or declaratory relief. *See* App. 71-73a. Pella's Rule 23(f) petition challenged the district court's failure to analyze differences in state law before certifying a nationwide class, *see* App. 35-37a, but the Seventh Circuit appears to have dismissed that point as no more than a "minor concern[] that relate[s] primarily to the manageability of the class." App. 10a.

That dismissive approach conflicts with numerous decisions recognizing that certification of a nationwide class to pursue state-law claims is *per se* unwarranted without a careful analysis of the relevant laws of the fifty States to determine whether the claims can be proved on a classwide basis. *See, e.g., Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1189 (9th Cir. 2001); *Andrews*, 95 F.3d at 1024; *Castano*, 84 F.3d at 741-44; *In re American Med. Sys., Inc.*, 75 F.3d 1069, 1085 (6th Cir. 1996); *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1011-12, 1016-17 (D.C. Cir. 1986) (R.B. Ginsburg & Edwards, JJ.); *In re Asbestos School Litig.*, 789 F.2d 996, 1010 (3d Cir. 1986). Differences in state law are not a matter that can be swept under the rug; rather, as then-Judge R.B. Ginsburg, joined by Judge Edwards, explained, "nationwide class action movants must credibly demonstrate, through an extensive analysis of state law variances, that class certification does not present insuperable obstacles." *Walsh*, 807 F.2d at 1017 (internal quotation omitted). The decision below affirming certification of a nationwide class to pursue state-law claims without *any* analysis of the relevant laws of the fifty States cannot be squared with these precedents.

Nor does the federal Declaratory Judgment Act, 28 U.S.C. § 2201, allow courts to sidestep the requisite analysis of state law. As this Court has long explained, that Act is "procedural only," insofar as it creates a mechanism for declaring rights under substantive law but does not create any such rights. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937). Thus, the Act "does not create a basis for class certification under Rule 23(b)(2) if none exists" under the relevant substantive law. *Christ*, 547 F.3d at 1298; *see also Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 729 (9th Cir. 2007); *Bolin*, 231 F.3d at 978-79; *cf. Walsh*, 807 F.2d at 1011-12, 1016-17 (vacating certification of nationwide class under federal Magnuson-Moss Act, 15 U.S.C. § 2301 *et seq.*, which in turn incorporates state law). Under no circumstances does the Declaratory Judgment Act relieve a court of its obligation to analyze differences in state law before certifying a nationwide class to pursue state-law claims.

The Seventh Circuit's affirmance of the Rule 23(b)(2) class without any consideration of respondents' underlying claims is particularly egregious because many jurisdictions have specifically refused to recognize "no injury" claims. As noted above, this class includes persons who own "windows that have not manifested the alleged defect." App. 51a, 83-84a. Because many (if not most) States do not recognize "no-injury" claims (*i.e.*, claims regarding products that "have either not yet experienced a malfunction because of the alleged defect or have experienced a malfunction but not been harmed by it," *Coghlan v. Wellcraft Marine Corp.*, 240 F.3d 449, 455 n.4 (5th Cir. 2001)) there is certainly no basis to assume that uninjured owners

of ProLine casement windows in all fifty States have a common claim for which they may seek declaratory relief. *See, e.g.*, *O'Neil v. Simplicity, Inc.*, 574 F.3d 501, 503-05 (8th Cir. 2009); *Cole v. General Motors Corp.*, 484 F.3d 717, 729-30 (5th Cir. 2007); *Briehl v. General Motors Corp.*, 172 F.3d 623, 627-28 (8th Cir. 1999); *Ford Motor Co. v. Rice*, 726 So.2d 626, 627-31 (Ala. 1998). Needless to say, the Declaratory Judgment Act does not authorize declaratory relief in the absence of an underlying claim. *See, e.g.*, *Aetna Life*, 300 U.S. at 240-41. The Seventh Circuit has thus blessed a Frankenstein nationwide declaratory-judgment class of non-injured plaintiffs to pursue claims that may or may not even exist under the laws of any particular State.

The bottom line is that certification of a nationwide class action is an extraordinary step, and district courts may not take that step without carefully analyzing the laws of the fifty States for consistency. Here, there is no question that the laws of the fifty States differ with respect to respondents' claims. Indeed, the district court itself acknowledged those differences by certifying six state-specific damages subclasses under Rule 23(b)(3), App. 51a, 74-78a & n.12, 84a, and refusing to certify a seventh such subclass under North Carolina law, App. 62a n.7. *A fortiori*, that means that respondents cannot prove that final injunctive or declaratory relief is warranted for a nationwide class "as a whole." Fed. R. Civ. P. 23(b)(2). This Court should bring the Seventh Circuit back into line, lest that circuit become a magnet for nationwide "issue" class actions that could not be certified elsewhere. The Seventh Circuit's enthusiasm for "imaginative solutions" under Rule 23, App. 10a (internal quotation omitted),

must be tempered by this Court's admonition that "the text of [the] rule ... limits judicial inventiveness." *Amchem*, 521 U.S. at 620.

## CONCLUSION

For the foregoing reasons, the Court should grant this petition for writ of certiorari.

Respectfully submitted,

JAMES A. O'NEAL
JOHN P. MANDLER
AARON D. VAN OORT
FAEGRE & BENSON LLP
2200 Wells Fargo Center
90 South Seventh St.
Minneapolis, MN 55402
(612) 201-2121

CHRISTOPHER LANDAU, P.C
*Counsel of Record*
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000
*clandau@kirkland.com*

September 13, 2010

# APPENDIX

## APPENDIX CONTENTS

Seventh Circuit Opinion,
May 20, 2010 ..... 1a

Seventh Circuit Order denying rehearing,
June 14, 2010 ..... 12a

Defendants' Petition for Leave to Appeal Class Certification Order under Fed. R. Civ. P. 23(f),
June 26, 2009 ..... 14a

District Court Opinion and Order,
June 4, 2009 ..... 46a

First Amended Class Action Complaint,
November 8, 2006 ..... 85a

# In the
# United States Court of Appeals
## For the Seventh Circuit

No. 09-8025

PELLA CORPORATION AND PELLA WINDOWS AND DOORS, INC.,

*Petitioners,*

*v.*

LEONARD E. SALTZMAN, KENT EUBANK, THOMAS RIVA, AND WILLIAM AND NANCY EHORN, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

*Respondents.*

Petition for Leave to Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 1:06-cv-04481—**James B. Zagel**, *Judge.*

SUBMITTED MARCH 12, 2010—
DECIDED MAY 20, 2010

Before POSNER, WILLIAMS and TINDER,
*Circuit Judges.*

PER CURIAM. Pella Corporation manufactures windows for homes and sells them through its subsidiary, Pella Windows and Doors, Inc. (collectively "Pella"). Over the last 18 years, Pella has sold more than six million aluminum-clad wood "ProLine" casement windows nationwide. Plaintiffs, owners of structures containing the windows in question, allege that the windows contain a design defect that permits water to seep behind the

aluminum cladding and causes the wood to rot at an accelerated rate. In response to the number of windows needing replacement, Pella created the "Pella ProLine Customer Service Enhancement Program" to compensate affected customers. According to Plaintiffs, Pella attempted to modify its warranty through the program but never informed the end consumers of the program's existence or of the defect. Plaintiffs brought suit against Pella, alleging that it committed consumer fraud by not publicly declaring the role that the purported design defect plays in allowing rot. After the district court certified two classes of plaintiffs, Pella sought permission to appeal the certification pursuant to Federal Rule of Civil Procedure 23(f). We grant Pella's Rule 23(f) petition for permission to appeal and affirm the district court's decision certifying the classes.

## 1. BACKGROUND

The district court certified two classes of consumers in this action. First, it certified a nationwide class under Federal Rule of Civil Procedure 23(b)(2), consisting of all class members who own structures containing Pella ProLine aluminum-clad casement windows manufactured from 1991 to the present, whose windows have not yet manifested the alleged defect or whose windows have some wood rot but have not yet been replaced. The district court found the class met the criteria of Rule 23(b)(2) because Pella "has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). If successful,

these class members would be entitled to six declarations that together essentially declare that all ProLine windows have a defect which results in premature rotting and this defect requires disclosure; that Pella modified its warranty without notice by creating the enhancement program; that Pella must notify owners of the defect; that the ten-year limitation in the original warranty is removed; that Pella will reassess all prior warranty claims related to wood rot; and that Pella, upon a class member's request, will pay the cost of inspection to determine whether the wood rot is manifest, with any coverage disputes adjudicated by a Special Master. This class adjudication process would be followed by an individual claims process in which class members may file a claim with Pella for service "[i]f and when their windows manifest wood rot due to the alleged defect." The district court explained that absent class members also may bring individual suits for money damages.

The second group of certified classes is much narrower and consists of only those who have had a manifest defect and whose windows already have been replaced. The court certified six statewide liability classes under Federal Rule of Civil Procedure 23(b)(3) in California, Florida, Illinois, Michigan, New Jersey, and New York, on the theory that Pella violated state consumer fraud laws by failing to disclose the defect. Certification under Rule 23(b)(3) requires that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R.

Civ. P. 23(b)(3). The district court explicitly declined to certify issues related to causation, damages, and statute of limitations.

Pella seeks interlocutory review of these class certifications pursuant to Federal Rule of Civil Procedure 23(f), arguing, *inter alia*, that consumer fraud cases as a general matter are not amenable to class treatment, due to problems with causation, reliance, and calculating damages. We grant the petition in order to address the contention that consumer fraud claims are inappropriate for class treatment. *See Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 835 (7th Cir. 1999) (acceptance of an appeal is appropriate to "facilitate the development of the law" governing class actions). The parties' arguments are clearly set forth in Pella's Rule 23(f) petition and respondents' opposition, and no further briefing or argument is necessary. We affirm the district court's certification of the two classes.

## II. ANALYSIS

While consumer fraud class actions present problems that courts must carefully consider before granting certification, there is not and should not be a rule that they never can be certified. Pella relies on various decisions from this circuit reversing the grant of class certification in consumer fraud actions to draw the broad conclusion that consumer fraud cases are inappropriate for class treatment as a general matter. But those cases did not opine that class certification was *never* appropriate in consumer fraud cases, only that it was inappropriate in the circumstances before it. *See, e.g., Thorogood v. Sears, Roebuck and Co.*, 547 F.3d 742, 748 (7th Cir. 2008) (no common issues of law because there did not

appear to be a single understanding of the significance of labeling or advertising of the allegedly deceptive statements); *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 514 (7th Cir. 2006) (class certification inappropriate because the proposed class representative's claims were not typical of putative class); *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1018-19 (7th Cir. 2002) (tire-defect class action unmanageable given numerous different designs of allegedly defective tires and varying recalls).

In *Thorogood*, the court noted that there are times when class certification is "a sensible and legally permissible alternative to remitting all the buyers to individual suits each of which would cost orders of magnitude more to litigate than the claims would be worth to the plaintiffs." 547 F.3d at 748. We reassert that proposition here and hold that the district court properly weighed the facts before it and exercised its discretion to conclude that the common predominant issue of whether the windows suffer from a single, inherent design defect leading to wood rot is the essence of the dispute and is better resolved by class treatment. The district court reasonably determined that the individual issues that necessarily arise in a consumer fraud action would not prevent class treatment of the narrow liability issues here.

Class treatment of consumer fraud cases can certainly present difficulties, and courts should consider these concerns before deciding to grant class certification, as the district court did below. One concern is the risk of error in having complex issues that have enormous consequences decided by one trier of fact rather than letting a consensus emerge

from multiple trials. *Mejdrech v. Met-Coil Sys. Corp.*, 319 F.3d 910, 912 (7th Cir. 2003); *see also Thorogood*, 547 F.3d at 745. This is not a case where the issues are so complex, and Pella does not claim that the consequences are so high, that a decentralized process of multiple trials is necessary for an accurate evaluation of the claims. The district court held that the commonality requirement of Rule 23(a)(2) and the predominance requirement of Rule 23(b)(3) are both satisfied because the central questions in the litigation are the same for all class members—whether the ProLine windows suffered from an inherent defect when they left the factory, whether and when Pella knew of this defect, the scope of Pella's warranty, and the nature of the ProLine Customer Enhancement Program and whether it amended the warranty.

In contrast to *Thorogood* where there were no common issues of law or fact and the court questioned whether anyone besides the plaintiff shared the same concerns with the product, here there is an economy to class treatment of the question whether the ProLine windows suffer from a basic design defect, the resolution of which has the potential to eliminate the need for multiple, potentially expensive expert testimony and proof that would cost considerably more to litigate than the claims would be worth to the plaintiffs. *See Thorogood*, 547 F.3d at 748. According to class counsel, they already have been contacted by over 350 consumers who have experienced the same wood rot problems set forth in the complaint. Where there are common issues and the accuracy of the resolution of those issues "is unlikely to be enhanced by repeated proceedings, then it makes good sense,

especially when the class is large, to resolve those issues in one fell swoop while leaving the remaining, claimant-specific issues to individual follow-on proceedings." *Mejdrech*, 319 F.3d at 911.

Another concern in consumer fraud cases is the issue of proximate causation. Pella argues that too many individual variances between class members exist, because wood can rot for many reasons other than window design and is affected by specific conditions such as improper installation. Proximate cause, however, is necessarily an individual issue and the need for individual proof alone does not necessarily preclude class certification. 5 William B. Rubenstein, Alba Conte and Herbert B. Newberg, *Newberg on Class Actions* § 17.28, pp. 413-14 (4th ed. 2002). A district court has the discretion to split a case by certifying a class for some issues, but not others, or by certifying a class for liability alone where damages or causation may require individualized assessments. *See, e.g., Arreola v. Godinez*, 546 F.3d 788, 799800 (7th Cir. 2008); *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004). Under the district court's plan, class members still must prove individual issues of causation and damages. While it is almost inevitable that a class will include some people who have not been injured by the defendant's conduct because at the outset of the case many members may be unknown, or the facts bearing on their claims may be unknown, this possibility does not preclude class certification. *Kohen v. Pacific Inv. Management Co. LLC*, 571 F.3d 672, 677 (7th Cir. 2009), *citing* 1 Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 2:4, pp. 73-75 (4th ed. 2002). The narrow way in which the district court defined the classes here

eliminates concern that the definitions are overbroad or include a great many people who have suffered no injury.

Pella also argues that certification under Rule 23(b)(2) was inappropriate because this is really a case about money, and the class does not seek *final* injunctive relief as the rule requires, but only as a stop on the way to damages which individuals must then pursue. Rather than simplifying the litigation, Pella objects that the proposed declarations considered by the district court as injunctive relief are really illusory and will multiply, and even require, individual litigation. However, Pella mischaracterizes the effect of the six declarations contemplated by the district court. It is not necessarily the case that individual litigation would be required. The court split the purchasers of windows into two groups: those who have replaced their windows, and those who have not. Those who have replaced their windows are properly members of the (b)(3) class because they require the award of damages to make them whole. Those who have not replaced their windows but might in the future because of the purported design flaw are properly members of a (b)(2) class. Such purchasers would want declarations that there is an inherent design flaw, that the warranty extends to them and specific performance of the warranty to replace the windows when they manifest the defect, or final equitable relief. *Cf. Allen v. Int'l Truck & Engine Corp.*, 358 F.3d 469, 471 (7th Cir. 2004) (suggesting class treatment of the equitable relief to be followed by individual damage proceedings where the equitable relief sought is the same for all class members).

If the district court finds in favor of the class and enters all six declarations, the cumulative effect will be an entitlement to have their windows replaced, and the (b)(2) class will benefit uniformly from the declarations. The contemplated process in which members may file a claim with Pella for service does not appear to be any different than the process by which an owner would file a claim with Pella under a warranty. Having to adjudicate coverage issues with a Special Master is necessary only if there is a dispute; it would not be required for every class member as Pella suggests. Moreover, the district court specifically provided that "[t]here is no side-by-side recovery here." It explained that class members whose defect has not yet manifested are not included in the damages class; only once the windows experience any manifest defect, if ever, will the class members be able to submit a claim to Pella for repair.

Finally, Pella suggests that the manner in which the district court proposes to proceed will violate its Seventh Amendment rights because facts found by the class jury would necessarily be reviewed by the individual juries. Pella argues that the first jury must decide how much the design of the windows, as opposed to other factors, contributed to rot and that the individual juries must then consider the same issue later, but proximate cause is an individual issue and will not be addressed by the class jury. The class jury will be asked to decide only if there was an inherent design defect present in the windows when they left the factory, whether Pella had a duty to disclose the defect, and whether Pella attempted to modify its warranty. Issues of causation and damages issues, such as whether that

defect caused the damage to a particular window and how much the design contributed to the rot, will be handled individually. "Thus a class proceeding for equitable relief vindicates the seventh amendment as fully as do individual trials, is no more complex than individual trials, yet produces benefits compared with the one-person-at-a-time paradigm." *Allen*, 358 F.3d at 472.

Pella raises other minor concerns that relate primarily to the manageability of the class, but none of these demonstrate that the district court abused its discretion. Under Rule 23, district courts are permitted to "devise imaginative solutions to problems created by the presence in a class action litigation of individual damages issues." *Carnegie*, 376 F.3d at 661; *see also Lemon* v. *Int'l Union of Oper. Engineers*, 216 F.3d 577, 582 (7th Cir. 2000). In making the decision to certify the classes, the district judge had before him hundreds of pages of legal briefing, as well as hundreds of pages of documents, deposition transcripts, and expert reports. Plaintiffs point out that they submitted a sample trial plan with a comparative legal analysis of each subclass state, suggestions of how the case could be tried in phases, and a statement of class structure and remedies. Even the certification of the six state subclasses demonstrates that the district court carefully considered how the case would proceed, explicitly finding that the consumer protection acts of these six states have nearly identical elements and declining to certify a seventh state subclass that would have required a subjective analysis.

## III. CONCLUSION

The district court's decision to certify the two classes in this case did not contradict circuit precedent. While consumer fraud class actions present challenges that a district court must carefully consider, there are circumstances where certification is appropriate. We conclude that this case is one of those circumstances. We GRANT Pella's Rule 23(f) petition for permission to appeal and AFFIRM the decision of the district court certifying the classes.

# United States Court of Appeals

**For the Seventh Circuit**
**Chicago, Illinois 60604**

June 14, 2010

**Before**

RICHARD A. POSNER, *Circuit Judge*
ANN CLAIRE WILLIAMS, *Circuit Judge*
JOHN DANIEL TINDER, *Circuit Judge*

No. 09-8025

PELLA CORPORATION AND PELLA WINDOWS AND DOORS, INC.,

*Petitioners,*

*v.*

LEONARD E. SALTZMAN, KENT, EUBANK, THOMAS RIVA, AND WILLIAM AND NANCY EHORN, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

*Respondents.*

Petition for Leave to Appeal from the United States District Court for the Northern District of Illinois, Easter Division.

No. 1:06-cv-4481

James B. Zagel, *Judge.*

**O R D E R**

On consideration of the petition for panel rehearing or rehearing en banc filed by Respondents on June 3, 2010, all members of the original panel have voted to deny the petition for rehearing. No

judge in regular active service requested a vote on the request for rehearing en banc.* Accordingly, the petition is DENIED.

---

* Circuit Judge Flaum did not participate in the consideration of the petition for rehearing en banc.

**June 26, 2010**

No. 09-_____

United States Court of Appeals for the
Seventh Circuit

Dr. Leonard E. Saltzman, Kent Eubank, Thomas Riva, William and Nancy Ehorn, individually and on behalf of all other similarly situated,
Plaintiffs-Respondents,

vs.

Pella Corporation, an Iowa corporation, and Pella Windows and Doors, Inc., a Delaware corporation,
Defendants-Petitioners.

On Appeal From The United States District Court
For The Northern District Of Illinois
Case No. 1:06-cv-04481
The Honorable James B. Zagel

# DEFENDANTS' PETITION FOR LEAVE TO APPEAL CLASS CERTIFICATION ORDER UNDER FED. R. CIV. P. 23(f)

KIRKLAND & ELLIS LLP
David M. Bernick, P.C.
Matthew T. Regan, P.C.
300 North LaSalle
Chicago, IL 60654
312-862-2000
Fax: 312-862-2200
david.bernick@kirkland.com
matthew.regan@kirkland.com

FAEGRE & BENSON, LLP
James A. O'Neal
John P. Mandler
Aaron D. Van Oort
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-3901
Phone: (612) 766-7000

WILDMAN, HARROLD,
ALLEN & DIXON LLP
John A. Roberts
225 West Wacker Drive, 30th Floor
Chicago, IL 60606-1229
Phone: (312) 201-2121

*Attorneys for Defendants-Petitioners*

## STATEMENT OF JURISDICTION

The District Court has jurisdiction of these putative class actions under 28 U.S.C. § 1332(d). The matter in controversy exceeds the sum or value of $5,000,000, exclusive of interests and costs, because plaintiffs claim replacement costs and other damages allegedly caused by approximately six million windows. 28 U.S.C. § 1332(d)(2). At least one member of the putative class is also a citizen of a state different from any defendant. 28 U.S.C. § 1332(d)(2)(A). The named plaintiffs are Leonard Saltzman, a citizen of Illinois; Thomas Riva, a citizen of Florida; Lubo and Maria Hadjipetkov, citizens of New Jersey; and William and Nancy Ehorn, citizens of California. Dkt. 20, ¶¶ 4-6. Defendant Pella Corporation is incorporated in Iowa and its principal place of business is in Iowa. Dkt. 20, ¶ 7. Defendant Pella Windows & Doors, Inc., is incorporated in Delaware and its principal place of business is in Illinois. Dkt. 20, ¶ 8; Dkt. 56 ¶ 8.

The Court of Appeals has jurisdiction to entertain this Petition under Fed. R. Civ. P. 23(f) and Fed. R. App. P. 5(a). This Petition is timely, because it is filed within 10 days after the District Court entered its class certification order on June 12, 2009, calculated under Fed. R. Civ. P. 6. (The District Court signed the order on June 4, 2009, but the order was not entered on the court's docket until June 12, 2009, and "the crucial date for determining timeliness is the date the order was entered on the district court's docket sheet, not the date it was signed." *In re ANR-Advance Transp. Co.*, 73 Fed. Appx. 183, 185 (7th Cir. 2003); *see also Adono v.*

*Wellhausen Landscape Co.*, 258 Fed. Appx. 12 (7th Cir. 2007) (same).)

## TABLE OF CONTENTS

STATEMENT OF JURISDICTION ..... 1

QUESTIONS PRESENTED ..... 1

INTRODUCTION ..... 1

FACTUAL AND PROCEDURAL BACKGROUND 3

ARGUMENT ..... 9

I. The district court's certification of plaintiffs' consumer fraud claims for class litigation is a clear abuse of discretion under this Court's precedent ..... 9

II. The district court's decision to sever plaintiffs' damages claims for individual litigation and certify a mandatory Rule 23(b)(2) class to litigate a remaining novel claim for relief unfounded in any substantive law requires immediate review ..... 12

A. This is not a Rule 23(b)(2) case, and severing plaintiffs' damages claims for separate litigation cannot make it one .. 12

B. The district court's certification of a nationwide class with no analysis of what substantive law will govern plaintiffs' claims is plain error ..... 13

III. The district court's novel attempt to eliminate individual issues by certifying Rule 23(b)(3) classes to litigate only the purportedly common issues requires immediate review ..... 15

IV. Both of the district court's contrived class actions will multiply litigation and violate

deeply rooted procedural safeguards that protect plaintiffs and defendants alike..... 17

A. Any natural presentation of window owners' claims for wood rot would be extraordinarily individualized..... 17

B. In a case this individualized, no class can be certified without either violating rules on claim splitting or summarily barring individual claims.... 18

C. The subsequent individual litigation required by the district court's order will violate the Seventh Amendment by reexamining factual issues decided in the class trial..... 19

CONCLUSION..... 20

* * *

## QUESTIONS PRESENTED

1. May courts create a mandatory Rule 23(b)(2) class by severing the damages claims of consumer fraud plaintiffs for individual litigation and certifying a novel theory of relief, unfounded in any substantive law, that would have the court rewrite private warranties?

2. May a nationwide Rule 23(b)(2) class be certified on the theory that the federal Declaratory Judgment Act, 28 U.S.C. § 2201, provides a uniform national cause of action, eliminating differences in state law?

3. May Rule 23(b)(3) issue classes be certified to litigate small parts of claims when the claims as a whole are predominated by individual issues and dividing the claims will multiply litigation and violate the Seventh Amendment?

## INTRODUCTION

In the last 18 years, Pella has sold approximately six million wood ProLine casement windows nationwide. Plaintiffs contend that each of them was sold through consumer fraud because Pella did not publicly declare that they have an alleged design defect that, plaintiffs say, makes the wood more susceptible to rot. This Court has repeatedly held that consumer fraud claims such as these cannot be litigated as class actions because they contain predominantly individual issues. The district court conceded that plaintiffs' claims cannot be tried to judgment as a class because several issues, including "causation" are "too individualized" for class certification. Memorandum Opinion and Order (attached as addendum hereto [hereinafter "Add."])

12. But instead of denying class certification, the district court rewrote Rule 23 to certify a nationwide Rule 23(b)(2) class and six statewide classes under Rule 23(b)(3) to litigate small pieces of plaintiffs' claims on the theory that, "because I decline to certify a class on the issue of causation and damages," the individuality of those issues "is not an obstacle to certification on issues of liability." Add. 14. The district court's "issue" classes will not produce final judgments and will not eliminate individual litigation. Individual trials for each class member will follow the Rule 23(b)(3) class, and members of the Rule 23(b)(2) class, according to the district court, may bring their own, separate suits for damages.

For several reasons, this Court should grant review of the district court's certification order under Rule 23(f). First, "[a]ccepting an appeal in a big-stakes case is especially appropriate when the district court's decision is problematic, as it is here." *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 675 (7th Cir. 2001). The class certification order flies in the face of this Court's precedent. That alone is sufficient reason to review it. Second, an important function of Rule 23(f) "is permitting appellate review of important legal issues that otherwise might prove elusive." *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1016 (7th Cir. 2002). The district court's certification order raises three novel and important issues about the limits of Rule 23 set forth at the beginning of this petition. These issues are important not just to this case, but to the development of class action law generally.

Finally, this interlocutory appeal will likely be the Court's only chance to review the district court's order. Only this first decision of the district court on class certification can be reviewed under Rule 23(f), *Asher v. Baxter Int'l Inc.*, 505 F.3d 736 (7th Cir. 2007), and the Court cannot anticipate having the opportunity to review the decision after final judgment. The district court's certified classes will not produce a final judgment, only rulings leading to individual litigation. Moreover, this litigation will be so unmanageable, and the well-documented "pressure on the defendant to settle regardless of the actual merit of the suit" so extreme, that there may never be a final judgment. *Isaacs v. Sprint Corp.*, 261 F.3d 679, 681 (7th Cir. 2001). Granting review now to protect Pella against the coercive effect of the district court's order falls squarely within the purpose of Rule 23(f). *See In re Bridgestone*, 288 F.3d at 1015-16; *Thorogood v. Sears*, 547 F.3d 742, 745-46 (7th Cir. 2008).

## FACTUAL AND PROCEDURAL BACKGROUND

**A. Plaintiffs' claims.** The named plaintiffs in this case[1] seek to litigate a novel consumer fraud claim on behalf of owners and former owners of every aluminum-clad wood casement window sold by Pella under its ProLine brand over the last 18 years—approximately six million windows nationwide. Dkt. 114, p. 4. Because ProLine windows are made with wood, they are susceptible, as all outdoor wood

---

[1] Although the caption lists five individual plaintiffs, only two of them, Dr. Leonard E. Saltzman and Thomas Riva, are offered as potential class representatives of the certified classes.

products are, to rot. To prevent rot, Pella treats its wood with preservatives and protects the wood with design elements in the windows. Dkt. 117-1, Jablonski Dep. 72, 168, 178. These efforts largely succeed. After ten years in service, only 3.464% of windows of the vintage owned by named plaintiff Leonard Saltzman have had claims that are potentially related to wood rot. Dkt. 130, ¶¶ 3-4. Owners of this small percentage of windows can seek relief under Pella's 10-year limited warranty. Dkt. 20-1. Pella also provides extra-warranty service through the ProLine Customer Service Enhancement, which reimburses distributors for the labor costs of replacing windows within the warranty period and partially subsidizes the cost of replacement windows for five years after the warranty expires. Dkt. 115-3.

Plaintiffs nonetheless argue that Pella committed consumer fraud on the following novel theory: the ProLine casement windows' design allows water behind the aluminum cladding; this design makes all windows susceptible to rot, causes some windows to rot sooner than they should, and is therefore defective; and Pella committed consumer fraud by not publicly declaring the role defective design allegedly plays in allowing rot. Pella, of course, disagrees, but this petition is not the forum for settling those merits disputes.

**B. The classes plaintiffs sought to certify.** In the district court, plaintiffs sought in relevant part to certify two classes. First, plaintiffs sought a nationwide declaratory judgment class formed of "[a]ll persons in the United States who own structures containing Pella ProLine aluminum clad

casement windows manufactured from 1991 to present," Add. 2 n.3—premised solely on the federal Declaratory Judgment Act, 28 U.S.C. § 2201. Add. 2 n.3. Second, they sought a single Rule 23(b)(3) consumer fraud class of all persons in the states of Illinois, California, Florida, Michigan, New Jersey, New York, and North Carolina who purchased a ProLine casement window and/or own a structure containing such a window from January 1, 1991 to present. This class was premised on the consumer fraud laws of the named states.

**C. The district court's plan for certifying certain issues for class litigation, to be followed by individual suits.** The district court, recognizing that this Court repeatedly has reversed certifications of consumer fraud classes, *see infra* at 9, agreed that plaintiffs' claims could not be litigated to judgment as a class action because several individual issues will require separate litigation for each putative class member, among them:

**Causation**—"I agree that issues of causation are too individualized for class certification, and I have declined to certify a class on that issue." Add. 28 n.13.

**Injury and damages**—"[T]he inquiry with regard to damages ... is too individualized." Add. 12. The diminished value caused by the potential for wood rot "is simply too difficult to quantify, especially on a class-wide basis. ... This determination is too difficult to standardize fairly, and individualized issues would certainly dominate." Add. 29.

**Whether a claim is time barred**—"Accrual and tolling vary by state and therefore an individual determination is required." Add. 26.

The court nonetheless decided to certify classes to litigate certain issues, to be followed by separate suits for each class member litigating the individual issues.

**1. The nationwide Rule 23(b)(2) declaratory judgment class.** First, the district certified a single, nationwide class under Rule 23(b)(2) "for all class members whose windows have not manifested the alleged defect and whose windows have some wood rot but have not yet been replaced." Add. 5.[2] The district court's order does not identify the "members" of this class. But plaintiffs asked for a class of "[a]ll persons in the United States who own structures containing Pella ProLine aluminum clad casement windows manufactured from 1991 to present." Add. 2 n.3. That is presumably what the district court certified.

The district court also does not identify what substantive law will govern the claims of the members of the nationwide class. Plaintiffs argued that that the Declaratory Judgment Act provides a national rule of decision. Dkt. 144, p. 3. ("The claim supporting this class is a federal statute, 28 U.S.C. § 2201, with standard applicability and elements nationwide."). Presumably, that is what the district

---

[2] On plaintiffs' motion to clarify, the district court made it clear that this class includes *both* persons whose windows have not rotted *and* persons whose windows have rotted. Dkt. 164.

court concluded because it did not identify any other law.

Uncabined by the elements of any substantive law, the district court certified the Rule 23(b)(2) class to determine whether the court should rewrite Pella's warranty to make it apply in perpetuity and create a new window inspection and replacement program. Add. 2-3 n.3. Specifically, the court certified the class to litigate plaintiffs' entitlement to six declarations:

**Declaration I:** all ProLine windows have a defect that "result[s] in premature rotting" of the window, and this defect "requires disclosure to all of these windows";

**Declaration II:** the Proline Customer Service Enhancement initiated in 2006, which provides extra-warranty service for ProLine casement windows, "is a modification of Pella's warranty requiring disclosure";

**Declaration III:** "all persons who own structures containing Pella ProLine windows manufactured from 1991 to present are to be provided the best practicable notice of the defect, which cost shall be borne by Pella";

**Declaration IV:** "Pella's existing warranty on ProLine aluminum clad casement windows, limited to ten years for this defect is invalid and, as such that limitation is unenforceable. Pella shall provide notice to all persons covered by that warranty of the removal of this time limitation."

**Declaration V**: "The Court declares that Pella shall re-audit and reassess all prior warranty claims ... of claims related to ProLine window wood rot."

**Declaration VI**: "The Court declares that Pella shall establish an inspection program and protocol to be communicated to class members, which will require Pella to inspect, upon request, a class member's structure to determine whether wood rot is manifest. Any disputes over coverage shall be adjudicated by a Special Master appointed by the Court and/or agreed to by the parties."

Add. 2-3 n.3.

The identities of the putative class members are largely unknown. Pella sells windows mostly to independent distributors; national accounts such as Lowe's, Menard's and lumberyards; and large builders such as Morton Factory Homes. Dkt. 149-8, ¶¶ 3, 6-8. It often does not know the identities of the ultimate homeowners. In addition, over an 18-year period, ownership has changed for many of the houses, in some cases several times. To identify the class members, the district court indicated it would order notice by "publication, television and news media, and the Internet" and invite people to submit photographic proof that they own Pella ProLine casement windows. Add. 6. The court acknowledged that sometimes "claim supplementation may be required" to identify class members, involving in-person inspections of the class members' homes. Add. 6, 7 n.4. It did not specify who will oversee this process, or whether Pella will be entitled to dispute class membership, or whether only people who submit claims will be included in the class. The court stated only that "Defendants' concern that individual inquiry would be required to verify that particular class members have the windows in question is easily assuaged." Add. 6; *but see Simer v.*

*Rios*, 661 F.2d 655, 669 (7th Cir. 1981) (holding that courts must consider the burdens "that such a process might entail" in order to "decide whether the class device simply would be an inefficient way of trying the lawsuit for the parties as well as for its own congested docket").

The district court intends the class adjudication to be followed by an individual claims process. "If and when their windows manifest wood rot due to the alleged defect, they may file a claim with Pella for service." Add. 22. In addition, members of the Rule 23(b)(2) class may bring individual suits for damages independent of the class action. "Since they will not be afforded an opportunity to opt out of the 23(b)(2) class, the claims of absent class members seeking money damages arising from the alleged defect will not be barred by res judicata." *Id.*

**2. The six statewide Rule 23(b)(3) issue classes.** For persons who have replaced a Pella ProLine casement window because of wood rot (whether caused by the alleged design defect or something else), the district court certified:

> a Rule 23(b)(3) statutory consumer fraud class, consisting of the follow six state subclasses: California, Florida, Illinois, Michigan, New Jersey, and New York, for all members whose windows have exhibited wood rot and who have replaced the affected windows.

Add. 5. The order does not identify the "members" of this class. Plaintiffs asked for a class of "[a]ll persons in the [listed states] who purchased a Pella ProLine aluminum clad casement window/s and/or own a structure containing a Pella ProLine aluminum clad case [sic] window, between January

1, 1991 and present (date of certification)." Add. 2 n.1. That is presumably what the district court ordered.

The district court acknowledged that identifying the members of the damages classes will pose severe problems because the classes, by definition, include only those persons who already have replaced their Pella ProLine windows. Regarding the management of the identification process, the district court said only that "it is possible that they have records of a Pella inspection or have taken photographs of the window that might assist in proving their class membership." Add. 10.

Five of the six statewide Rule 23(b)(3) classes have no named plaintiff. Of the named plaintiffs, Saltzman alone lives in one of the listed states (Illinois) and has replaced a Pella ProLine window because of rot. No named plaintiff exists for the Florida, Michigan, New York, California, or New Jersey damages classes. The district court brushed this issue aside, commenting that "courts have permitted named plaintiffs to represent class members from other states." Add. 15.

The district court acknowledged that "the inquiry with regard to damages and causation is too individualized" to be conducted in a class action. Add. 12. The court declared, however, that "because I decline to certify a class on the issue of causation and damages," the individuality of those issues "is not an obstacle to certification on issues of liability." Add. 14. The court found that the commonality requirement of Rule 23(a)(2) and the predominance requirement of Rule 23(b)(3) were both satisfied because "the predominant questions will be the scope

of Pella's warranty, the nature of the [ProLine Customer Service Enhancement] and whether it amended the warranty, whether and when ProLine Windows suffered from an inherent wood 'durability' defect, whether and when Pella knew of the defect, and whether and when Pella publicly announced the defect and the PSEP [sic]." Add. 23 (quoting a district court opinion for the proposition that "[a] finding of commonality will likely satisfy a finding of predominance"); *but see Amchem Prods. v. Windsor*, 521 U.S. 591, 623-624 (1997) ("Even if Rule 23(a)'s commonality requirement may be satisfied by that shared experience, the predominance criterion is far more demanding."). The district court did not analyze how questions about Pella's warranty are relevant to the elements of plaintiffs' claims for consumer fraud. Nor did it address how it plans to manage the individual trials on causation, damages, and other individual issues that will take place after the class adjudication.

## ARGUMENT

### I. The district court's certification of plaintiffs' consumer fraud claims for class litigation is a clear abuse of discretion under this Court's precedent.

The consumer fraud claims raised in this case cannot be certified for class treatment under this Court's precedents because they are dominated by individual issues such as reliance, causation, injury, and damages.

This Court has repeatedly rejected class certification of consumer fraud claims. It did so in *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012 (7th Cir. 2002), which addressed consumer fraud claims

targeting allegedly defective tires that were prone to blowouts. It did so again in *Oshana v. Coca-Cola Co.*, 472 F.3d 506 (7th Cir. 2006), which addressed consumer fraud claims targeting Coca-Cola's failure to disclose the use of different sweeteners in fountain and bottled Diet Coke. It did so again in *Clark v. Experian Information Solutions, Inc.*, 256 Fed. Appx. 818 (7th Cir. 2007), which addressed consumer fraud claims targeting a website advertising free credit reports. And again, most recently, in *Thorogood v. Sears, Roebuck and Co.*, 547 F.3d 742 (7th Cir. 2008), which addressed consumer fraud claims targeting the failure to disclose the fact that part of a dryer's stainless steel drum was in fact mild steel coated by ceramic.

The consumer fraud claims that plaintiffs raise present in extreme form all of the individual issues that have caused the Court to reject class certification. First, plaintiffs' claims raise even greater individual issues of causation than the issues that precluded certification in *Bridgestone*. In *Bridgestone*, the alleged harm was an increased risk of tire blowouts and the issue was whether the alleged design defect or something else caused any particular blowout. *Bridgestone*, 288 F.3d at 1019 (cataloguing factors that affect the failure rate of tires). Here, the alleged harm is an increased risk of wood rotting and the issue is whether the alleged design defect or something else caused a particular instance of rot. This issue cannot be answered without individual discovery and hearings as to each window, because wood can rot for any number of reasons unrelated to window design—damage during installation, improperly sized openings, structural shifting of the house, defects in surrounding siding,

and on and on. Even "Plaintiffs' expert Charles Still noted that improper installation and factors other than the defect may cause water infiltration in and around the windows." Add. 12. The district court thus *agreed* "that issues of causation are too individualized for class certification." Add. 28 n.13.

The district court also agreed that the damages inquiry is "too individualized" for class treatment, Add. 12, just as it was in *Bridgestone* and *Thorogood*. As the district court explained in its opinion below, valuation

> is simply too difficult to quantify, especially on a class-wide basis. Windows are typically part of a larger structure, and many factors play a role in determining the valuation of that structure. Typically, individual pieces of the larger whole are not valued separately, but are rather one piece of the structure. This determination is too difficult to standardize fairly, and individualized issues would certainly dominate.

Add. 29[3]. These same issues afflicted the putative class in *Bridgestone* with respect to tires sold together with vehicles, *see* 288 F.3d at 1019 ("the resales may have reflected different discounts that could require vehicle-specific litigation"), and the putative class in *Thorogood* with respect to stainless steel drums sold only as part of clothes dryers, *see*

---

[3] The district court made this comment in the context of denying certification of plaintiffs' unjust enrichment claim, but it applies equally to damages under the consumer fraud claims, as the district court recognized elsewhere in its order. Add. 12.

547 F.3d at 748 ("some ... may have incurred no damages at all because on the whole they prefer their stainless steel dryer to any other dryer they could buy"). Just so—even more so—with windows in houses.

Plaintiffs are suing for consumer fraud, so they must also prove reliance. The district court held that "[b]ecause this case involves a failure to disclose, reliance is presumed. No individualized inquiry is required." Add. 14. That is incorrect. Saltzman, the sole named plaintiff for the damages action, resides in Illinois, and in Illinois, "[i]n order to establish consumer fraud under a theory of concealment by silence, the plaintiff must allege and establish ... that the plaintiff actually relied on the defendant's deception, and that if the plaintiff had known of the facts concealed, she would not have purchased the product." *De Bouse v. Bayer AG*, 896 N.E.2d 882, 889 (Ill. App. Ct. 2008). This Court likewise has held that "our prior case law confirms that a claim under ICFA requires individualized proof." *Clark*, 256 Fed. Appx. at 821. Just as often, the Court has rejected class certification. *See ibid*; *Oshana*, 472 F.3d at 513-14 (all plaintiffs in Diet Coke sweetener case would be required to prove that they were "deceived in some manner and damaged by the deception"); *Thorogood*, 547 F.3d at 747 ("[e]ach class member ... will have to testify to what he understands to be the meaning of a label or advertisement that identifies a clothes dryer as containing a stainless steel drum"). Proving reliance on the alleged omission here, where people *know* that wood can rot and where many people bought a house, not a separate window, will be a profoundly individualized task.

Still another individual issue is whether each class member's claim is time barred. This case seeks to reach back 18 years. The statutes of limitations are much shorter. As the district court acknowledged, "[a]ccrual and tolling vary by state and therefore an individual determination is required." Add. 26. *See, e.g., Gene & Gene LLC v. BioPay LLC*, 541 F.3d 318 (5th Cir. 2008) ("[T]he predominance of individual issues necessary to decide an affirmative defense may preclude class certification" (internal quotation marks omitted)).

This Court has never affirmed the certification of claims raising so many individual issues.

## II. The district court's decision to sever plaintiffs' damages claims for individual litigation and certify a mandatory Rule 23(b)(2) class to litigate a remaining novel claim for relief unfounded in any substantive law requires immediate review.

The district court's attempt to fashion a mandatory, nationwide Rule 23(b)(2) class out of state-law-based consumer fraud damages claims is so novel, will so certainly multiply litigation, and is so unlikely to stand, that this Court should review and reverse it immediately.

### A. This is not a Rule 23(b)(2) case, and severing plaintiffs' damages claims for separate litigation cannot make it one.

Rule 23(b)(2) applies to cases in which the final injunctive or declaratory relief the plaintiff seeks will decide the issue for an entire class of people, whether a class action is certified or not. *See, e.g., Allen v. Int'l Truck and Engine Corp.*, 358 F.3d 469, 471 (7th

Cir. 2004) ("The need for, if not inevitability of, class-wide treatment when injunctive relief is at stake is what Rule 23(b)(2) is about.") This is not a Rule 23(b)(2) injunction case; it is a damages case. The putative class members are people who own windows that either have rotted (a small proportion) or that may rot. What these people want is compensation for an alleged harm. They do not want an injunction ordering Pella to stop selling windows. They want money.

Rule 23(b)(2) "does not extend to cases," like this one, "in which the appropriate final relief relates exclusively or predominantly to money damages." Advisory Committee Notes to the 1966 Amendments to Fed. R. Civ. P. 23. Nor can a court convert a damages case into a Rule 23(b)(2) case by severing the damages claims for later individual litigation and certifying a class to declare whether the plaintiffs have the right to seek damages. *See Bolin v. Sears Roebuck & Co.*, 231 F.3d 970, 978-979 (5th Cir. 2000) ("The mere recitation of a request for declaratory relief cannot transform damages claims into a Rule 23(b)(2) class action."). The only declaratory relief that qualifies a claim for Rule 23(b)(2) certification is "final" declaratory relief "corresponding" to a final injunction. Fed. R. Civ. P. 23(b)(2). This Court held in *Andrews v. Chevy Chase Bank* that when declaratory relief "can do no more than simply declare that a certain group of plaintiffs have the right to initiate" a claim for relief, "that is not a form of 'final' declaratory relief under Rule 23(b)(2)." 545 F.3d 570, 577 (7th Cir. 2008).

The district court's class violates both the text of Rule 23(b)(2) and the *Andrews* decision because it

will not finally resolve anything. At most, it will determine whether class members have the right to "file a claim with Pella for service" under a new, court-created warranty, with resulting coverage litigation before a court-appointed special master. Add. 22 and 3 n.3. The order thus does not prevent individual litigation, it requires it. In addition, the district court held that, *regardless* of what happens in the Rule 23(b)(2) action, "the claims of absent class members seeking money damages arising from the alleged defect will not be barred by res judicata." Add. 22. So every member of the Rule 23(b)(2) can file his or her own claim for damages and litigate it simultaneously with the class action.

The consequences of the district court's approach are sweeping. If the district court is correct, a Rule 23(b)(2) class can be certified in every case alleging consumer fraud premised on an alleged omission, and plaintiffs can always litigate individual damages claims in parallel with class claims for "declaratory" relief. This Court should grant immediate review to reject this rewriting of Rule 23(b)(2).

**B. The district court's certification of a nationwide class with no analysis of what substantive law will govern plaintiffs' claims is plain error.**

The "declarations" that the district court believed provided the basis for the Rule 23(b)(2) class are, moreover, illusory. Plaintiffs have never identified any substantive law that would authorize a decree that Pella's ten-year limited warranty is now a warranty in perpetuity or that would allow a court to create a new window monitoring and replacement

program that Pella must fund and that the federal judiciary will oversee. Add. 3 n.3.

They argued that a nationwide class seeking these declarations was appropriate because the Declaratory Judgment Act, 28 U.S.C. § 2201, creates a federal cause of action. Dkt. 144 ("The claim supporting this class is a federal statute, 28 U.S.C. § 2201, with standard applicability and elements nationwide."). The district court apparently agreed, which is plain error. "[T]he operation of the Declaratory Judgment Act is procedural only." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937). It does not "create[] a substantive cause of action." *Akins v. Penobscot Nation*, 130 F.3d 482, 490 n.8 (1st Cir. 1997); *see also Christ v. Beneficial Corp.*, 547 F.3d 1292, 1298 (11th Cir. 2008) (the DJA "does not create a basis for class certification under Rule 23(b)(2) if none exists under" the substantive law underpinning the request for relief (internal quotation marks omitted)).

The only possible sources of substantive law for Plaintiffs' claims are the consumer fraud acts of the various states, whose differences this Court has held preclude certification of a nationwide class. "State consumer-protection laws vary considerably, and courts must respect these differences rather than apply one state's law to sales in other states with different rules." *In re Bridgestone/Firestone Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1018 (7th Cir. 2002). Under Illinois choice-of-law rules, which apply in this case brought under diversity jurisdiction in Illinois, *Klaxon v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941), no one state's law governs plaintiffs' claims—a point both plaintiffs and the

district court concede by seeking separate subclasses for different states for the damages claims. That precludes certification of a nationwide class, because "[n]o class action is proper unless all litigants are governed by the same legal rules." *Bridgestone*, 288 F.3d at 1015.

The district court's decision to certify declaratory judgment claims that are pulled from the ether instead of from substantive state law is alone a sufficient reason to grant review. Moreover, claims as novel as plaintiffs' are inappropriate for any class, let alone a national class. They are better adjudicated in individual trials from which a consensus can emerge, rather than all at once in a single action. *See Bridgestone*, 288 F.3d at 1020; *In re: Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1302 (7th Cir. 1995); *see also Castano*, 84 F.3d at 749 ("certification of an immature tort brings with it unique problems that may consume more judicial resources than certification will save.").

**III. The district court's novel attempt to eliminate individual issues by certifying Rule 23(b)(3) classes to litigate only the purportedly common issues requires immediate review.**

Rule 23(b)(3) provides no better a method for adjudicating for plaintiffs' predominantly individual claims than Rule 23(b)(2). The district court's certification of six statewide classes to litigate only the purportedly common issues in class members' claims will not prevent individual litigation, it will guarantee it. In addition, it violates clear precedent holding that predominance is measured on the claims as a whole and only when common issues

predominate overall may any issues be certified for class treatment.

Rule 23(c)(4) allows an action to be "maintained as a class action with respect to particular issues" only "[w]hen appropriate." Fed. R. Civ. P. 23(c)(4). It is not appropriate to certify particular issues within a Rule 23(b)(3) damages class when common issues do not predominate in the action as a whole. The Fifth Circuit held this directly: "Reading rule 23(c)(4) as allowing a court to sever issues until the remaining common issue predominates over the remaining individual issues would eviscerate the predominance requirement of rule 23(b)(3); the result would be automatic certification in every case where there is a common issue, a result that could not have been intended." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996). Other circuits are in accord. *See In re St. Jude Med., Inc.*, 522 F.3d 836, 841 (8th Cir. 2008) ("Even courts that have approved 'issue certification' have declined to [exercise it] where the predominance of individual issues is such that limited class certification would do little to increase the efficiency of the litigation."); *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 234 (2d Cir. 2008) ("We recognize that a court may employ Rule 23(c)(4) to certify a class as to common issues that do exist. ... Nevertheless, in this case, given the number of questions that would remain for individual adjudication, issue certification would not reduce the range of issues in dispute and promote judicial economy." (quotation omitted)).

The same rule is implicit in this Court's decisions. In *Andrews v. Chevy Chase Bank*, 545 F.3d 570 (7th Cir. 2008), the court reversed certification of a

rescission class under the Truth In Lending Act because it found that the most that could be accomplished in the class would be to "declare that a certain group of plaintiffs have the right to *initiate* rescission," leaving the determination whether to award rescission to individual proceedings. *Id.* at 577. Analyzing whether the certification could be upheld under Rule 23(b)(3), the Court addressed whether individual issues would predominate in the litigation as a whole, declaring, "If the class certification only serves to give rise to hundreds or thousands of individual proceedings requiring individually tailored remedies, it is hard to see how common issues predominate or how a class action would be the superior means to adjudicate the claims." In *Clark v. Experian Information Solutions, Inc.*, the Court affirmed the denial of issue certification under Rule 23(c)(4) because individual issues predominated in the case as a whole, saying, "we find the rationale for denying class certification generally to be applicable." 256 Fed. Appx. at 822. "Because of the need for individualized findings in such a large class, little efficiency would be gained by certifying a class for only particular issues." *Id.* Moreover, in none of the cases cited above where the Court found a lack of predominance—not in *Bridgestone* or *Oshana* or *Clark* or *Thorogood*—did the Court remand to certify a class formed of just the common issues.

Contrary to this authority, the district court's opinion analyzes predominance as if only the issues certified for class treatment count toward the analysis: "[B]ecause I decline to certify a class on the issue of causation and damages, Defendants' argument [about an individual causation issue] is

not an obstacle to certification on issues of liability." Add. 14. This Court should grant review in this case to clarify that predominance is measured on the action as a whole, and to reverse certification of plaintiffs' predominantly individual claims.

## IV. Both of the district court's contrived class actions will multiply litigation and violate deeply rooted procedural safeguards that protect plaintiffs and defendants alike.

The one error underlying every other error that the district court committed was its failure to recognize that plaintiffs' claims are so individualized that *no* class, no matter how creatively defined or precisely limited, will be superior to individual adjudication. Insisting on a class for claims as individualized as these puts the court to a choice: (1) multiply litigation and violate the Seventh Amendment by splitting off individual claims and issues for separate adjudication in addition to the class action; or (2) bar individual claims without any presentation in the class litigation through the operation of *res judicata*. Neither choice is superior to individual litigation. In the decision below, the district court chose inefficiency and claim splitting.

### A. Any natural presentation of window owners' claims for wood rot would be extraordinarily individualized.

If window owners brought their own suits, and thus had no incentive to abandon individual theories, remedies, or defendants in order to manufacture a class action, they would raise extraordinarily individualized claims for relief. Depending on the law in their respective states, they could sue under theories of express warranty, implied warranty,

common law fraud, and unjust enrichment, in addition to the consumer fraud claim raised on behalf of the class. For relief, they could seek damages for personal injury and loss to property beyond the window itself (such as a damaged wall, floor, or personal property), in addition to the replacement window or out-of-pocket costs for the replacement that the district court is allowing in its classes. (We know such claims may exist, because the named plaintiffs claimed that they had property damage caused by water infiltration and at least one testified that he has personal injuries from mold for which he blamed Pella. Dkt. 117-2, Saltzman Dep. 71-73; Dkt. 117-1, Eubank Dep. 127, 130-131; Dkt. 117-2, Riva Dep. 122. For defendants, they could name not just the manufacturer, but also the contractor who installed the house, adding theories of breach of contract and negligence.

**B. In a case this individualized, no class can be certified without either violating rules on claim splitting or summarily barring individual claims.**

In a case such as this one, where so many legal claims and injuries potentially exist that cannot be—and will not be—addressed in the class action, no rule of *res judicata* or claim preclusion can make the class action superior to individual litigation. If the unaddressed claims and remedies are barred by *res judicata*, as courts have held they may be, *see, e.g., City of Chicago v. Shalala*, 1998 U.S. Dist. LEXIS 4463, at *27-33 (N.D. Ill. Mar. 31, 1998), then class treatment is inferior for the absent class members who may have claims for much greater relief than are presented in the class extinguished without ever

having been presented. Several courts have denied class certification for this reason. *See, e.g., In re Teflon Prod. Liability Litig.*, 254 F.R.D. 354, 368 (S.D. Iowa 2008); *Pearl v. Allied Corp.*, 102 F.R.D. 921, 923-24 (E.D. Pa. 1984); *Feinstein v. Firestone Tire and Rubber Co.*, 535 F. Supp. 595, 606-07 and n.7 (S.D.N.Y. 1982). If, on the other hand, the unaddressed claims are not barred by *res judicata*, then the only consequence of the class litigation will be to *multiply* litigation rather economize it.

Multiplying litigation is the path the district court chose for its Rule 23(b)(2) class, where it held that class members are free to litigate separate claims for damages—for the very same claims of defect for the very same windows, based on the very same theories litigated in the class action. Add. 22. This is the ghost of forbidden one-way intervention classes reincarnated in a new form. *See Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 677 (7th Cir. 2001) (a class must be able to "lose as well as win"). For the Rule 23(b)(3) class, the district court expressed no clear position. It wrote in one place that "[t]he opportunity to opt out ... solves any res judicata problem." Add. 18. In another place, it wrote that "Plaintiffs in this case have not 'abandoned' any claims, since they were never brought in the first place," Add. 20, which both misses the point (individual claims *do* exist, even if plaintiffs did not raise them) and is factually incorrect (plaintiffs *did* raise individual claims that are not part of the class). What is certain is that the Rule 23(b)(3) class certified by the district court will require both class litigation and individual trials to adjudicate fewer theories with fewer available remedies than would be adjudicated in ordinary,

individual litigation. This is the inevitable consequence of forcing class actions on individual claims they do not fit.

### C. The subsequent individual litigation required by the district court's order will violate the Seventh Amendment by reexamining factual issues decided in the class trial.

The Seventh Amendment's command that "no fact tried by jury, shall be otherwise re-examined in any Court of the United States," U.S. Const. amend. VII., limits courts' ability to manufacture class actions by dividing claims—and the district court violated it.

In certifying issue classes under Rule 23, courts "must not divide issues between separate trials in such a way that the same issue is reexamined by different juries." *Rhone-Poulenc*, 51 F.3d at 1303. Common issues can be plucked out of individual claims only if the court is able to "carve at the joint." *Id.* at 1302; *see also Castano v. Am. Tobacco Co.*, 84 F.3d 734, 750 (5th Cir. 1996). In *Rhone-Poulenc*, the district court certified an issue class to litigate whether the defendant was negligent in failing to take certain steps to screen blood fluids and solids for the HIV virus, leaving issues of causation and damages for later, individual trials. *Rhone-Poulenc*, 51 F.3d at 1303. This Court reversed, holding that the juries in the individual trials would necessarily reconsider the defendants' culpability when they determined comparative negligence and proximate cause, thus violating the Seventh Amendment. *Id.*; *see also Castano*, 84 F.3d at 751 ("second jury would be impermissibly reconsidering the findings of a first jury" in considering comparative negligence).

The classes certified below present the very same problems. The issues certified for class treatment include whether aspects of the ProLine windows' design caused windows to prematurely rot and, if so, how large an effect they had. Add. 23. These issues will require the first jury to decide how much design, as opposed to other causes such as improper installation, contributed to rot. The identical issues will be reconsidered in any individual damages actions brought by members of the Rule 23(b)(2) classes. The same issues, moreover, will be reconsidered again and again in each of the individual trials on causation and damages required for members of the Rule 23(b)(3) class. As the Court stated in *Rhone-Poulenc*, "How the resulting inconsistency between juries could be prevented escapes us." 51 F.3d at 1303.

## CONCLUSION

The Court should grant review of the district court's novel order certifying Rule 23(b)(2) and Rule 23(b)(3) classes to litigate particular issues within plaintiffs' predominantly individual claims.

Dated: June 26, 2009

Respectfully submitted,

WILDMAN, HARROLD,
ALLEN & DIXON LLP
John A. Roberts (#6220432)
225 West Wacker Drive, 30th Floor
Chicago, IL 60606-1229
Phone: (312) 201-2121

FAEGRE & BENSON, LLP
James A. O'Neal
John P. Mandler
Aaron D. Van Oort
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-3901
Phone: (612) 766-7000

KIRKLAND & ELLIS LLP
David M. Bernick, P.C.
Matthew T. Regan, P.C.
300 North LaSalle
Chicago, IL 60654
312-862-2000
Fax: 312-862-2200
david.bernick@kirkland.com
matthew.regan@kirkland.com

*Attorneys for Defendants-Petitioners*

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

DR. LEONARD E. SALTZMAN, KENT EUBANK, THOMAS RIVA, and WILLIAM and NANCY EHORN, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

PELLA CORPORATION, an Iowa corporation, and PELLA WINDOWS AND DOORS, INC., a Delaware corporation,

Defendants.

No. 06 C 4481
Judge James B. Zagel

**MEMORANDUM OPINION AND ORDER**

## I. BACKGROUND

Plaintiff window owners filed suit individually and on behalf of all others similarly situated against Defendant Pella alleging fraudulent concealment of an inherent product defect. Plaintiffs are owners of structures with Pella ProLine windows, which they allege have an inherent design defect "that has or will result in rot of the wood components which reduces the windows' useful life to as little as three years." Plaintiffs allege that Defendant manufacturer Pella Corporation and Defendant

reseller Pella Windows and Doors, failed to disclose the defect to Plaintiffs prior to their purchase of the windows. According to Plaintiffs, the wood rot resulting from the defect was so widespread that in 2006, Pella created the ProLine Customer Service Enhancement Program ("PSEP") to compensate customers affected by the defect, however, Pella never informed current customers of the defect or of the PSEP. Plaintiffs further allege that Pella has also failed to inform prospective customers of the defect.

In their first amended complaint, Plaintiffs alleged several counts: (1) violation of consumer fraud statutes, (2) violation of deceptive trade practice acts, (3) fraud by omission, (4) breach of implied warranty of merchantability, (5) unjust enrichment, and (6) declaratory relief pursuant to 28 U.S.C. § 2201. Plaintiffs' fourth count was dismissed based on the statute of limitations. Plaintiffs now move to certify the following classes: (1) Rule 23(b)(3) Statutory Consumer Fraud Class (including seven state-specific subclasses)[1] (2) Rule 23(b)(3) Unjust Enrichment Class,[2] (3) Rule 23(b)(2)

---

[1] Rule 23(b)(3) Statutory Consumer Fraud Class: All persons in the states of Illinois, California, Florida, Michigan, New Jersey, New York, and North Carolina, who purchased a Pella ProLine aluminum clad casement window/s and/or own a structure containing a Pella ProLine aluminum clad case window, between January 1, 1991 and present (date of certification).

[2] Rule 23(b)(3) Unjust Enrichment Class: All persons in the states of Illinois, California, Florida, Iowa, Michigan, New Jersey, New York, North Carolina and Ohio who purchased

Declaratory Judgment Class;[3] they seek to reserve their fraud by omission claim for class certification

---

Pella ProLine aluminum clad casement windows, between January 1, 1991 and present (date of certification).

[3] Rule 23(b)(2) Declaratory Judgment Class: All persons in the United States who own structures containing Pella ProLine aluminum clad casement windows manufactured from 1991 to present.

Plaintiffs seek the following declaratory relief:

**Declaration I:** The Court finds that all Pella ProLine aluminum clad casement windows, manufactured from 1991 to present, have a defect in the aluminum cladding of the sash component that allows water to get behind the aluminum cladding resulting in premature rotting of the wood component of the sash which wood rot may progress to adjacent wood components. The rotting of the wood component may not be detectable until after the warranty provided by Pella has expired. The Court finds that this defect is material and requires disclosure to all of these windows.

**Declaration II:** In August of 2006 Pella initiated a Pella Service Enhancement Program to provide limited remediation of wood rot in ProLine aluminum clad casement windows manufactured from 1991 to 2003. All persons who owned structures containing ProLine casement windows manufactured from 1991 to 2003 were eligible for this program. Pella however did not disclose to the persons eligible either the existence of the enhancement of their warranties, the limited remediation available, or that the windows covered by the program were defective in material and workmanship when manufactured.

The Court finds that the Pella Service Enhancement Program is a modification of Pella's warranty requiring disclosure to all persons eligible for this Program.

**Declaration III:** The Court finds that all Pella ProLine aluminum clad casement windows manufactured from 1991 to present have a defect in workmanship and material that allows water to penetrate behind the aluminum clad sash component

of the window resulting in premature rotting of the wood component, which rot may progress to adjacent wood components, and that the rotting of the wood component may not be detectable until after the existing warranty provided by Pella has expired. The Court declares that all persons who own structures containing Pella ProLine windows manufactured from 1991 to present are to be provided the best practicable notice of the defect, which cost shall be borne by Pella.

**Declaration IV:** In August of 2006 Pella initiated a Pella Service Enhancement Program to provide limited remediation of wood rot in ProLine transom, awning and casement windows manufactured from 1991 to 2003. Only persons who owned structures containing ProLine transom, awning and casement windows manufactured from 1991 to 2003 and who repeatedly complained to Pella were purportedly included in and eligible for this program. Because the Court has determined that all Pella ProLine aluminum clad casement windows manufactured from 1991 to present have a defect in workmanship and material that allows water to penetrate behind the aluminum clad sash component of the window resulting in premature rotting of the wood component against reasonable expectations, and because the Court has found that Pella knew of this defect when it first manufactured these windows, the Court finds that the Pella Service Enhancement Program is insufficient to remediate the defects know by Pella to exist. The Court therefore declares that Pella's existing warranty on ProLine aluminum clad casement windows, limited to ten years for this defect is invalid, and, as such that limitation is unenforceable. Pella shall provide notice to all persons covered by that warranty of the removal of this time limitation.

**Declaration V:** The Court declares that Pella shall re-audit and reassess all prior warranty claims, including claims previously denied in whole or in part, where the denial was based on warranty or on other grounds, of claims related to ProLine window wood rot, whether internally coded by Pella as 06 or similar.

**Declaration VI:** The Court declares that Pella shall establish an inspection program and protocol to be

pending further discovery. Plaintiffs also seek individual damages associated with repair and replacement, attorneys' fees and costs, and injunctive relief compelling Defendants (1) to establish a program to inspect, replace and install defective Pella windows; and (2) to re-audit denied warranty claims based on the defect. In considering Plaintiffs' motion for class certification, I may not conduct a preliminary inquiry into the merits of the underlying claims. *Eisen* v. *Carlisle & Jacqueline,* 417 U.S. 156, 177-178 (1974). However, I may look beyond the pleadings to determine whether the requirements of Rule 23 are met. *Szabo* v. *Bridgeport Mach., Inc.,* 249 F.3d 672, 677 (7th Cir. 2001). In order to proceed as a class action, the Plaintiffs must prove their action meets the four requirements of Rule 23(a) and the requirements of at least one subsection of Rule 23(b). *Eisen,* 417 U.S. at 163; *see also Calkins* v. *Fidelity Bond & Mortgage Co.,* No. 94 C 5971, 1998 U.S. Dist. LEXIS 16144, at *2 (N.D. Ill. Oct. 8, 1998). In order to satisfy the four requirements of Rule 23(a), the representative parties must demonstrate that "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative

---

communicated to class members, which will require Pella to inspect, upon request, a class member's structure to determine whether wood rot is manifest. Any disputes over coverage shall be adjudicated by a Special Master appointed by the Court and/or agreed to by the parties.

parties will fairly and adequately protect the interests of the class."

In addition to the four express requirements of Rule 23(a), there are two implied requirements: (1) that an identifiable class exists ("definiteness"), and (2) that the named representatives are members of the class. *LeClercq* v. *Lockformer* Co., No. 00 C 7164, 2001 U.S. Dist. LEXIS 2115, at *5 (N.D. Ill. Feb. 28, 2001). A class can be properly identified so long as it is defined by objective criteria. *Id.* at *5-6. This criteria must make it administratively feasible for the court to determine whether a particular individual is a class member. *Curtis* v. *Voss,* 73 F.R.D. 580, 582 (N.D. Ill. 1976); *see also* 7A Charles A. Wright, Arthur R. Miller, *Federal Practice and Procedure,* § 1760, at 120-121 (1972).

Plaintiffs have proposed several alternative class structures. For the following reasons, I grant, in part, Plaintiffs' Motion for Class Certification, certifying the following classes: (1) a Rule 23(b)(2) declaratory judgment class for all class members whose windows have not manifested the alleged defect and whose windows have some wood rot but have not yet been replaced; and (2) a Rule 23(b)(3) statutory consumer fraud class, consisting of the following six state subclasses: California, Florida, Illinois, Michigan, New Jersey, and New York, for all members whose windows have exhibited wood rot and who have replaced the affected windows. I am denying Plaintiffs' motion to certify an unjust enrichment class.

## II. DISCUSSION

### A. Rule 23(a) Requirements

#### 1. Implied Requirements

"While the class does not have to be so ascertainable that every potential member can be specifically identified at the commencement of the action, the description of the class must be sufficiently definite so that it is administratively feasible for the court to ascertain whether a particular individual is a member." *Joseph* v. *General Motors Corp.*, 109 F.R.D. 635, 639 (D. Colo. 1986); *see also Fournigault* v. *Independence One Mortgage Corp.*, 234 F.R.D. 641, 644 (N.D. Ill. 2006). Defendants claim that Plaintiffs have not adequately set forth identifiable classes, arguing that (1) the majority of Pella's sales are to builders and contractors, and even if an independently-owned distributor has records of the end-user's address, Pella cannot access these records; and (2) Pella is unable to identify end purchasers from its sales to retail stores. Defendants maintain that because Pella records do not identify most class members, individual inquiry would be required to verify that particular class members have the windows in question.

There is some evidence that Pella and its distributors keep some records of purchasers and warranty claims data. Where Pella's records may be insufficient, provision of notice can supplement class identification efforts. Notice by publication has been used in cases where potential class member names were confidential or impracticable to ascertain. *See In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 536-537 (3d Cir. 2004) (Where class members were

consumers of a prescription drug, and names and addresses of these consumers were confidential and not available to parties, notice by publication combined with call center and website was sufficient notice to identify class members.); *Macarz* v. *Transworld Sys., Inc.*, 201 F.R.D. 54, 59 (D. Conn. 2001) (notice by publication used where circumstances "make it impracticable to gain the names and addresses of class members and notify them individually of the action's pendency"); *Mirfasihi* v. *Fleet Mortg. Corp.*, 356 F.3d 781, 786 (7th Cir. 2004) (Internet notice of settlement was acceptable substitute for individual notice where Defendant had no record of part of a class of customers.). Plaintiffs' proposal that notice be made by publication, television and news media, and the Internet is adequate in these circumstances to identify the class members.

Defendants' concern that individual inquiry would be required to verify that particular class members have the windows in question is easily assuaged. Plaintiffs persuasively argue that determining class membership would not be significantly distinct from Pella's routine administration of the PSEP program, and would therefore be effective and impose little burden. First, the same visual inspection done by Pella following a warranty claim can be conducted by the homeowner himself. The notice to class members can include information necessary to conduct a self-inspection, whereby a homeowner could identify his windows as the Pella variety at issue here. Second, Pella

currently accepts photos to assess damage to windows,[4] and there is precedent for the use of photos to document claims in class actions. *See Pelletz* v. *Weyerhaeuser Co.*, 255 F.R.D. 537 (W.D. Wash. 2009) (Claims process in deck building products case was reasonable where it required class members to answer two claim forms and submit ten photographs of alleged product defect.).

Because the class can be relatively easily ascertained through a combination of the use of sales records, publication of notice, and verification by photograph, I find that an identifiable class exists.

Next, Defendants argue that the class definitions are ambiguous because (1) it is unclear whether the term "purchasers" refers to people who purchased their homes from builders or purchased their windows from contractors doing remodeling; (2) it is unclear whether the phrase "persons ... who ... own a structure" includes residents of a class state who own a structure in a non-class state; (3) ProLine casement windows which have since been replaced will not be available for inspection.

---

[4] If photographs are inadequate in some cases, claim supplementation may be required. However, even if inspections are necessary, they would not be burdensome to Defendants, as such inspections are already conducted in Pella's normal course of business to provide purchase quotes or repair estimates. Additionally, the PSEP calls for inspection only for customers with ten or more units being replaced, demonstrating that an inspection process is not always necessary for window identification.

"[I]nvestigating whether or not certain prospective class members will fit th[e class definition] criteria goes too far in the direction of judging the merits." *See Fournigault, 234* F.R.D. at 644. However, it is worth noting that at this stage, there does not appear to be much ambiguity with regard to terminology used in defining the classes.[5] The proposed statutory fraud class includes purchasers and owners of a structure. Defendants make much of the indirect purchaser who may have paid a builder or contractor for labor and materials that include Pella windows, and ask whether such a purchaser would be included in the purchaser class. Plaintiffs, however, make it clear that end-users are indeed purchasers. Since the statutory fraud class does not include windows without a manifested defect, builders or contractors who merely purchase a window for installation as part of their work are clearly excluded (assuming that the defect does not manifest itself prior to the sale of the structure containing the window). Furthermore, based on the remedy structure that I am allowing, there is no danger of double recovery on the same window. If the window was repaired or replaced, then it is the party that paid for this repair that stands to recover, whether the purchaser or structure owner. If the window has not been replaced, then there is no relief until and unless the defect manifests.

Defendants next argue that it is unclear whether "persons ... who ... own a structure" include residents

---

[5] Plaintiffs note that this terminology is a duplication of Pella's terms in the PSEP documents.

of a class state who own a structure in a non-class state. Intertwined with this argument is another of Defendants' arguments—that Plaintiffs' proposed class is improperly broad because it includes individuals without "standing," as a Plaintiff residing in a class state may have purchased his windows in a non-class state. I address the issue of standing infra, however it is important to note here that, "[a] class may be certified even though the initial definition includes members who have not been injured or do not wish to pursue claims against the defendant." *Elliott* v. *ITT Corp.*, 150 F.R.D. 569, 575 (N.D. Ill. 1992). Any issue relating to whether class members will ultimately be able to prove their damages goes to the merits of the case and not to class certification.

Defendants also point to conflict-of-law concerns, however, "Rule 23 specifically provides for multiple classes in a single case, Fed. R. Civ. P. 23(c)(4)(B), and classes have been certified in cases where multiple classes were required."[6] *Williams v. Chartwell Fin. Servs., 204* F.3d 748, 760 (7th Cir. 2000). Courts have created subclasses to manage any potential conflicts among different state's laws. *See Klay v. Humana, Inc.*, 382 F.3d 1241, 1262 (11th Cir. 2004), *cert. denied sub nom. UnitedHealth*

---

[6] Rule 23(c)(5) states: "When appropriate, a class may be divided into subclasses that are each treated as a class under this rule." According to the Advisory Committee, "[w]here a class is found to include subclasses divergent in interest, the class may be divided correspondingly, and each subclass treated as a class." Fed. R. Civ. P. 23(c)(4) advisory committee's note (1966) (currently 23(c)(5)).

*Group, Inc. v. Klay*, 543 U.S. 1081 (2005) (noting advantages for grouping state laws and certifying subclasses accordingly); *Fournigault, 234* F.R.D. at 643 (certifying seven state subclasses). *Calkins* v. *Fidelity Bond & Mortg. Co.*, No. 94C5971, 1998 WL 719569, at *3 (N.D. Ill. Oct. 8, 1998) (creating state subclasses to avoid conflicts of law); MANUAL FOR COMPLEX LITIGATION (FOURTH) §22.634, p. 412 (2004) (noting the option of creating subclasses if the law of only a few jurisdictions applies).

Finally, even where an individual has allegedly purchased ProLine windows and has already had them replaced, it is possible that that individual will be able to produce proof of class membership. Defendants point to *In re Teflon Products Liability Litigation*, 254 F.R.D. 354, 363 (S.D. Iowa 2008) to support their proposition that discovery would not likely assist the court in determining whether such individuals are class members. In *In re Teflon*, "even after a lengthy discovery period, during which each proposed representative was thoroughly deposed, many individuals themselves [were] unable to ascertain whether they belong in a particular subclass." *Id.* In *Teflon*, Plaintiffs brought claims against DuPont, alleging that it misrepresented the safety of its non-stick cookware coating, which had been shown to decompose at normal cooking temperatures, releasing a potentially harmful synthetic chemical. In most instances, the proposed representatives could not produce any documentation identifying the cookware at issue, nor was visual examination an effective tool for identification. *Id.* at 361-362. However, such is not the case here. The class representatives in this case have been able to produce some documentation or

proof of identification as to the model of windows they own. Unlike the alleged defect in this case, the shortcoming at issue in *Teflon* was not a visible one. Where potential class members have experienced the wood rot at issue in this case, it is possible that they have records of a Pella inspection or have taken photographs of the window that might assist in proving their class membership.

**2. Express Requirements**

The four requirements of Rule 23(a) the Plaintiffs must prove to proceed as a class are, in short: numerosity, commonality, typicality and adequacy. Numerosity is not at issue in this case.

**a. Commonality**

Commonality is satisfied if "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Plaintiffs can meet this requirement by showing a common nucleus of operative facts exists between the named plaintiffs and the class. *Keele v. Wexler,* 149 F.3d 589, 594 (7th Cir. 1998). A common nucleus of operative facts is said to exist when a defendant has "engaged in standardized conduct toward members of the proposed class." *Id.* at 594. The determinative question is whether the same issues would necessarily be re-litigated over and over again if plaintiffs were required to bring separate actions. *Joseph,* 109 F.R.D. at 642 (D. Colo. 1986). In this case, Plaintiffs maintain that common questions include the scope of Pella's warranty, the nature of the PSEP and whether it amended the warranty, whether and when Pella ProLine Windows suffered from an inherent wood "durability" defect, whether and when Pella knew of the defect, and whether and when Pella publicly announced the

defect and the PSEP. These are questions that are common to the class, and are allegedly a result of Pella's standardized conduct toward the class members. Were each member in the class to bring separate actions under state consumer fraud statutes, "these questions would necessarily be litigated over and over, and the same evidence would be presented in each case." *Id.*

Defendants argue that a class cannot be defined so broadly so as to include class members "who are without standing to maintain an action on their own behalf." *McElhaney v. Eli Lilly & Co.*, 93 F.R.D. 875, 878 (D.S.D. 1982). Defendants point specifically to *Neuser v. Carrier Corporation*, in which the court refused to certify a class of plaintiffs that "own or owned high efficiency furnaces manufactured by Carrier since January 1, 1988." 2007 WL 1470855, at *3 (W.D. Wis. May 15, 2007). In that case, the plaintiffs alleged a defective secondary heat exchanger which increased the failure rate of furnaces containing this component. *Id.* at *2. The court held that certification was inappropriate. Many of the class members had "no claim," because they would have no damages, noting that "it is impossible to distinguish class members whose furnaces will fail from those who will not. The class of plaintiffs for which certification is sought is too broad and there is no reasonable means to reduce it to those individuals who might actually have claims similar to those of the named plaintiffs." *Id.* at *5. Similarly, Defendants claim, most of the putative class members in this case will have windows that manifest no wood deterioration, and that there is no feasible way to distinguish them from those whose windows might manifest a defect in the future.

This analogy fails. In *Neuser,* Plaintiffs brought a contract claim for fraud in the inducement, which requires proof that the defendant knew of the defect and potential product failure, intentionally concealed this fact with intent to induce the plaintiff to purchase the product, and that the purchaser relied on the "assumed durability" of the product and was damaged by the purchase. *Id.* at *3. Damages are an essential element of the claim, and it is clear from the court's ruling that a latent defect does not qualify. In this case, the six statutory consumer fraud subclasses will consist only of plaintiffs with manifest defects.

Plaintiffs argue that common issues also exist as to damages, including the type of injury and the amount of damages, and that such issues will vary by subclass but not by class member. As part of their proposal, Plaintiffs seek as damages out-of-pocket expenses paid by those class members whose windows have manifested the defect, and who have paid to have them replaced. However, the inquiry with regard to damages and causation is too individualized. First, where the window has been removed from the structure and is no longer available, even an on-site inspection will not suffice. Determination of such damages would require findings on several highly individualized issues. Each of these members will have paid different sums for replacement and repairs of varying degrees. Furthermore, each class member who has had windows replaced, and whose windows and wood rot are not available for inspection, will need to provide documentation or other evidence of class membership. Causation will also be an issue relevant to all class members whose windows have

manifest wood rot. In his deposition, Plaintiffs' expert Charles Still noted that improper installation and factors other than the defect may cause water infiltration in and around the windows. (Still Dep. at 80:19-82:8 and 26:15-27:8). Although issues of liability are common to the class, the questions of causation and damages are not, and it is for this reason that I find certification for common issues of liability under state consumer fraud statutes appropriate, but I decline to certify a class for the issues of causation and damages. *See In re Telectronics Pacing Systems, Inc. Product Liability Litigation*, 164 F.R.D. 222 (S.D. Ohio 1995) (limiting a class suit to liability issues only, and avoiding individualized inquiries that would arrive in determining damages).

**b. Typicality**

Under Rule 23(a), typicality is satisfied if "the claims or defenses of the representative parties are typical of the claims or defenses of the class." The issue of typicality is closely related to commonality and should be liberally construed. *See Keele*, 149 F.3d at 595; *Whitten* v. *ARS Nat'l Servs. Inc.*, No. 00 C 6080, 2001 WL 1143238, at *3-4 (N.D. Ill. Sept. 26, 2001). The typicality requirement can be met when the representative party's claim arises from the same course of conduct that gives rise to the claims of other class members and all of the claims are based on the same legal theory. *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983).

First, Defendants claim that because representative Plaintiff Saltzman purchased ProLine casement windows even after he initiated the suit, "issues of materiality and proximate cause are likely

to be a major focus of the litigation of his claim." However, this argument does not demonstrate an atypicality of claims, but rather implicates issues of causation. In cases where plaintiffs allege fraud by omission, relevant state laws apply an objective standard in the determination of whether the omission is material.[7] Saltzman's reasons for purchasing more windows are not relevant to this inquiry. Moreover, because I decline to certify a class on the issue of causation and damages, Defendants' argument is not an obstacle to certification on issues of liability.

Next, Defendants argue that because Saltzman relied on a builder's recommendations in selecting Pella windows, the inquiry will shift to the builder. This inquiry-shift, however, does not apply in omission cases. *See Williams v. Balcor Pension Investors*, 150 F.R.D. 109, 113 (N.D. Ill. 1993) ("Reliance may be presumed where there is a failure to disclose, yet, where a claim involves both omissions and misrepresentations, this presumption

---

[7] Under North Carolina law, a duty to disclose must be established for a statutory consumer fraud claim based on a material omission. *Kron Medical Corp.* v. *Collier Cobb & Associ., Inc.*, 420 S.E.2d 192, 197 (N.C. Ct. App. 1992). That duty arises when persons have concealed material facts. *Bear Hollow, L.L.C.* v. *Moberk, L.L.C*, No. 5:05CV210, 2006 WL 1642126, at *6 (W.D.N.C. June 5, 2006). In that context, "[a] fact is material if the fact untruly asserted or wrongfully suppressed, if it had been known to the party, would have influenced [its] judgment or decision in making the contract at all." *Id.* (quotations omitted). This is a subjective inquiry, which makes a North Carolina subclass inappropriate for certification.

is not available."). Defendants further argue that Saltzman's statutory fraud claim requires individualized inquiries into actual reliance and deception. Because this case involves a failure to disclose, reliance is presumed. No individualized inquiry is required. *See Lipinski v. Martin J Kelly Oldsmobile,* Inc., 759 N.E.2d 66, 70 (Ill. App. 2001) ("it is not necessary ... to show actual reliance in order to state a valid claim based on an omission or concealment under the Consumer Fraud Act.").

Lastly, Defendants argue that because only two named Plaintiffs, residing in subclass states Illinois and Florida, have ProLine casement windows,[8] there are no named Plaintiffs who have standing to sue under the law of the remaining class states – California, Michigan, New York and New Jersey. However, the standing inquiry at this point is limited to an assessment of whether or not the *individual named* Plaintiffs have "suffered an 'injury in fact' which is fairly traceable to the challenged action of the defendant and 'likely,' as opposed to merely 'speculative," to be 'redressed by a favorable decision.'" *Payton* v. *County of Kane,* 308 F.3d 673, 676-677, 682 (7th Cir. 2002) (citations omitted). The Seventh Circuit has followed the Supreme Court's direction in *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815 (1999) and held that class certification should normally precede Article III standing challenges.

---

[8] Named Plaintiff Kent Eubank also has ProLine casement windows installed in his home, however, he resides in Iowa, which is not included in the Plaintiffs' proposed consumer fraud class.

*Payton*, 308 F.3d at 680. Additionally, courts have permitted named plaintiffs to represent class members from other states in which the representatives did not reside or make purchases. *See, e.g., In re Relafen Antitrust Litig.*, 221 F.R.D. 260, 267-69 (D. Mass. 2004) (certifying named plaintiffs who purchased the drug at issue only in certain states to represent class members who purchased the drug in other states, and deferring consideration of argument that named plaintiffs lacked standing to assert claims on behalf of those class members) (citing *Payton*, 308 F.3d at 681).

**c. Adequacy**

Rule 23(a)(4) requires that the "representative parties will fairly and adequately protect the interest of the class." Fed. R. Civ. P. 23(a)(4). The adequacy requirement is satisfied where the named representative (1) has retained competent counsel, (2) has a sufficient interest in the outcome of the case to ensure vigorous advocacy, and (3) does not have interests antagonistic to those of the class. *In re VMS Ltd. Pshp. Sec. Lit.*, No. 90 C 2412, 1992 U.S. Dist. LEXIS 14445, at *13 (N.D. Ill. Sept. 23, 1992). The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent. *Amchem Products, Inc.* v. *Windsor*, 521 U.S. 591, 625 (U.S. 1997). "[A] class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Id.* at 625-26 (citations omitted). Defendants argue (1) owner's interests diverge from the interests of non-owner purchasers since the court must determine a fixed award for each window in order to prevent double

recovery; (2) the interests of named plaintiffs diverge from those of the class where Plaintiffs are engaged in claim splitting – named Plaintiffs have expressed an intent to seek damages for property damage but are not seeking remedies for such claims on class certification; and (3) the interests of the latent and manifest defect groups are not aligned in that individuals with manifest defects will want immediate payments, and those with latent defects will want a go-to fund for future use.

Defendants' first argument is overcome by the proposed class structure. The declaratory judgment and injunctive relief sought here apply only to a class of structure owners whose windows are either latently defective or are manifesting a defect but have not yet been replaced. The consumer fraud class, seeking damages, includes only those who have had a manifest defect and whose windows have been replaced. If the defect is manifest and the window has not yet been replaced, the remedy is that the window be fixed. If the defect is manifest and the window has been replaced, the party who paid for the replacement, whether the current structure owner or the purchaser of the window, may recover his costs. There is no danger of double recovery.

Defendants' second argument does raise a matter of significant concern. There have been several instances where courts have denied class certification" on the basis that class representatives are inadequate when they opt to pursue certain claims on a class-wide basis while jeopardizing the class members' ability to subsequently pursue other claims." *In re Universal Service Fund Telephone Billing Practices Litigation*, 219 F.R.D. 661, 669 (D.

Kan. 2004). *See, e.g., In re Teflon Products Liability Litigation*, 254 F.R.D. 354, 366-68 (S.D. Iowa 2008) (finding inadequacy of representation where, by abandoning original claims and disavowing others, "the representative plaintiffs risk a future waiver not only of their own [ ] claims, but also those of the absent class members."); *Thompson* v. *American Tobacco Co.*, 189 F.R.D. 544, 550 (D. Minn. 1999) (finding that "the named Plaintiffs' efforts to reserve personal injury and damage claims may, in fact, jeopardize the class members' rights to bring such claims in a subsequent case."); *Feinstein* v. *Firestone Tire and Rubber Co.*, 535 F. Supp. 595, 606-607 (D.C.N.Y. 1982) (finding named plaintiffs to be inadequate representatives where named plaintiffs in defective tire case failed to bring death, injury, accident-related property damages, and other consequential damage claims). The danger with claim-splitting is that res judicata will bar any future – claims by absent class members. As the *Thompson* court cautioned:

> [R]epresentatives who tailored the class claims in an effort to improve the possibility of demonstrating commonality obtained this essentially cosmetic benefit only by presenting putative class members with significant risks of being told later that they impermissibly split a single cause of action.

*Thompson*, 189 F.R.D. at 547.

If Plaintiffs' claims are true, then all class members have suffered the injury of being sold defective windows—windows whose value has diminished due to the defect. However, the injuries of the named Plaintiffs appear to be more significant

than this. Windows are not stand-alone products; they are incorporated into the structure of a building, and it is certainly possible, in fact, even likely, that wood rot originating in the window itself may cause more widespread problems in the walls, structure, or interior of the building, especially when the entire window must be removed. Although Plaintiffs in this case have at no point pled personal injury or property damage claims, they have expressed some interest in pursuing such claims in the future claims based on the same conduct and transactions that are the subject of the current allegations.[9] It is conceivable that absent class members may also want to bring such claims for

---

[9] While deposition testimony is itself not part of the pleadings, "sometimes it maybe necessary for the court to probe behind the pleadings before coming to rest on the certification question." *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 599 (7th Cir. 1993) (citing *General Telephone Co. of Southwest* v. *Falcon* 457 U.S. 147, 160 (1982)); *See Balderos v. Illinois Vehicle Premium Finance Co.*, No. 96 C 8050, 1997 WL 627650, at *4 (N.D. Ill. Oct. 2, 1997) (considering Plaintiff's deposition testimony in determining whether his claims were typical of the class.). In his deposition, Plaintiff Saltzman discusses his desire to recover costs allegedly associated with the wood rot at issue, including stucco repair, the cost of new window moldings, and repainting. (Saltzman Dep. 71:17-73:20). He also mentions potential negative impact on his home's resale value. *Id.* In their depositions, Plaintiffs Kent Eubank. and Riva noted that were they to discover any damage in the walls upon removing their rotted windows, they would seek to recover any associated costs. (K. Eubank. Dep. 127:1-127:4) (T. Riva Dep. At 122:13-122:18). During his deposition, Plaintiff Kent Eubank stated that he hoped to reserve the right to bring a personal injury lawsuit due to his exacerbated mold allergies. (K. Eubank. Dep. 129:13-131:3).

similar damages. The opportunity to opt out as required by Federal Rules of Civil Procedure 23(b)(3) and (c)(2)(B) solves any res judicata problem. As the court explained in *Gasperoni v. Metabolife, Intern. Inc.*, No. 00-71255, 2000 WL 33365948, at *4 (E.D. Mich. Sept. 27, 2000)

> If those people with individual personal injury claims can opt out of the class, or are specifically excluded from the definition of the class, there is no danger of the class waiving any individual claims of its members. Moreover, the only legal issue to be certified is simply whether the label is materially misleading. Any personal injuries that develop in class members after the present suit, will not be subject to res judicata because their claim will not have been actually litigated, nor will it be one that "might have been raised" in the previous suit.

It is clear, however, from the examples discussed *supra*, that not all courts share this view. *See Feinstein*, 535 F. Supp. at 599, 606-07, n.16 (although putative class members in defective tire case asserted no claims for death, injury or accident-related property damage, the court found that they were inadequate class representatives due to the possibility that they were claim-splitting, and '[i]t is difficult to imagine many courts sanctioning separate actions for property and injury claims arising out of the same incident."). Where "the named Plaintiffs have in fact jeopardized the class members' potential claims for personal injury damages, they would be deemed to have interests 'antagonistic' to those of the class." *Thompson v. American Tobacco Co., Inc., 189*

F.R.D. 544, 550 (D. Minn., 1999). However, these cases are distinguishable. In *Feinstein,* the alleged defect at issue spawned "numerous specific actions for death, injury or damage[.]" 535 F. Supp. at 597. In this case, Defendants have presented no evidence of any specific actions alleging damages above and beyond window repair and replacement.[10] In *Thompson,* the plaintiffs reserved the issues of personal injury and damages to make class certification more likely, however, that is not the case here. In this case, Plaintiffs have expressly reserved only claims for fraud by omission, saying nothing of personal injury claims or property damages claims.

Plaintiffs cite *In re Universal Service,* 219 F.R.D. at 669, to support their claim that certification is appropriate here. In that case, Plaintiffs abandoned their common law fraud claims, but continued to pursue all of their other damages claims, including a claim for trebeled damages, "a remedy akin to the punitive damage claim plaintiffs elected to forego when they abandoned their fraud claim." The court noted that the fraud claims were not suitable for class adjudication, and that the plaintiffs were not abandoning stronger claims for money damages in favor of certifying weaker claims. In this case,

---

[10] Defendants discuss at length *Pappas v. Pella Corporation,* No. 06 L 12771, Order, Circuit Court of Cook County, at 1-2, Aug. 21,2007, where a similar motion for class certification was brought and denied. In that case, plaintiffs "anticipate[d] that the damages [would] be window replacement or reimbursement for window replacement." Defendants put forth no evidence of specific actions for other types of damages.

named Plaintiffs seek monetary damages in the form of actual out-of-pocket costs of window repair and replacement, as well as declaratory and injunctive relief ordering the re-audit of denied warranty claims and the establishment of an inspection program. Plaintiffs have not abandoned stronger claims in favor of weaker claims; in fact Plaintiffs in this case have not "abandoned" any claims, since they were never brought in the first place. The essence of the issue in this case is an allegedly defective window; any claims for related damages will most likely be less significant and less common. Absent class members will be given the opportunity to opt out of the class if they so choose in order to pursue claims for such damages.[11]

Finally, Defendants argue that interests of class members with manifest wood rot are not aligned with those of class members whose windows are latently defective. However, this argument is based on *Amchem Products*, 521 U.S. at 626, where the Court made note of the disparity between currently injured plaintiffs and exposure-only plaintiffs in an asbestos class action. In that case, "named parties with diverse medical conditions sought to act on behalf of a single giant class rather than on behalf of

---

[11] Plaintiffs argue that class actions are one of "the recognized exceptions to the rule against claim splitting," citing 18 Moore's Federal Practice § 131.40[3][e][iii] (2002) (citing Restatement (Second) of Judgments § 26(1)(c) (1982)). The court in *Makar Issues & Rights, Ltd.* v. *Tellabs, Inc.*, No. 02 C 4356, 2009 WL 448895, *9 (N.D. Ill. Feb. 23, 2009) recently noted this exception. The Seventh Circuit's decision in *Crowder* signals that this circuit recognizes such an exception.

discrete subclasses." *Id.* That is not the case here. Plaintiffs have proposed discrete subclasses designed around the type of injury to the class member. Named Plaintiffs are alleging a mixture of latently defective and manifestly defective windows (both replaced and not yet replaced), so they will adequately be able to represent all of the certified subclasses.

### B. Rule 23(b)(2)

Defendants argue that Plaintiffs have failed to satisfy several of the Rule 23(b)(2) requirements for class certification.

#### 1. Action on Grounds Applying Generally to the Class

First, Defendants argue that because Pella found that some named Plaintiffs were eligible for PSEP and others not, they have not "acted or refused to act on grounds that apply generally to the class." Plaintiffs, however, contend that Pella acted or refused to act on grounds that apply generally to the class by failing to disclose material facts about the defect, and by secretly creating and implementing the PSEP and by not applying it consistently. Rule 23(b)(2)

> does not require that all members of the class be aggrieved by the challenged conduct, but proponents of a Rule 23(b)(2) class must be able to demonstrate that the 'conduct or lack of it which is subject to challenge be premised on a ground that is applicable to the entire class,' and that the entry of declaratory or injunctive relief would remove a barrier or impediment common to the class.

*Kazarov v. Achim*, No. 02-5097, 2003 WL 22956006 (N.D. Ill. Dec. 12, 2003) (citation omitted). Plaintiffs allege conduct by Pella that is applicable to the class.

Second, Defendants claim that "in order for a class to be certified under Rule 23(b)(2), the relief sought on behalf of the class must be primarily equitable in nature. The commentary to Rule 23 explains, '[t]his subdivision is intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate. ... The subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages. *Cima v. WellPoint Health Networks, Inc.*, 250 F.R.D. 374, 380 (S.D. Ill. 2008) (quoting Fed. R. Civ. P. 23 advisory committee's note.). Defendants maintain that the primary relief Plaintiffs request is pecuniary, and therefore, certification under Rule 23(b)(2) is inappropriate. However, the 23(b)(2) class consists only of those class members whose windows have not yet been replaced. The relief for this class is declaratory and injunctive—not monetary. If and when their windows manifest wood rot due to the alleged defect, they may file a claim with Pella for service.

This ties into Defendants' next assertion that "[b]ecause unnamed members are bound by the action without the opportunity to opt out of a Rule 23(b)(2) class, even greater cohesiveness generally is required than in a Rule 23(b)(3) class." *In re St. Jude Medical, Inc.* 425 F.3d 1116, 1121-22 (8th Cir.

2005) (citations omitted). It is true that "there is no right to opt out of a Rule 23(b)(2) class action." *Kifer v. Ellsworth,* 346 F.3d 1155, 1157 (7th Cir. 2003) (citations omitted); However, "[a]bsent class members seeking non-incidental money damages may only be barred by res judicata if they have been afforded notice and an opportunity to opt out as required by Rule 23(b)(3) and (c)(2)(B)." *Gates,* 456 F. Supp. 2d at 963 (N.D. Ill., 2006). Since they will not be afforded an opportunity to opt out of the 23(b)(2) class, the claims of absent class members seeking money damages arising from the alleged defect will not be barred by res judicata.

Defendants claim that Plaintiffs' proposed declaratory statement that the alleged defect results in wood rot presumes causation and is inconsistent with the conclusions of the Defense expert. Plaintiffs argue that in their proposed statements, they do not ask the court to presume causation in all individual instances, only to make a finding regarding the nature of the wood durability defect and its cause. In either case, Plaintiffs will have to prove the substance of the declarations they propose, and the inconsistency that Defendants point out can be dealt with during an evaluation of the merits of the case.

**C. Rule 23(b)(3)**

Defendants argue that Plaintiffs have failed to satisfy several of the Rule 23(b)(3) requirements for class certification.

**1. Predominance**

"Considerable overlap exists between the court's determination of commonality and a finding of predominance. A finding of commonality will likely

satisfy a finding of predominance because, like commonality, predominance is found where there exists a common nucleus of operative facts." *Fournigault,* 234 F.R.D. at 646 (N.D. Ill. 2006) (citations omitted). Plaintiffs argue that common issues as to Pella's liability predominate over individual issues. Specifically, the predominant questions will be the scope of Pella's warranty, the nature of the PSEP and whether it amended the warranty, whether and when Pella ProLine Windows suffered from an inherent wood "durability" defect, whether and when Pella knew of the defect, and whether and when Pella publicly announced the defect and the PSEP.

First, Defendants argue that choice of law and standing issues are implicated and are highly individualized inquiries requiring the consideration of facts surrounding each transaction. Plaintiffs respond that their alternative proposal to certify subclasses by each state, to which each state's respective consumer fraud act would apply, makes this irrelevant.[12] According to the Advisory

---

[12] In this case, certification of six statutory consumer fraud subclasses is appropriate. Although there are some differences in state consumer protection statutes, the factual and legal questions to be answered are substantively the same. The consumer fraud laws of the six states—California, Florida, Illinois, Michigan, New Jersey and New York—have nearly identical elements: injury, some form of causation and/or reliance, and materiality of the omission in dispute.

Whether the state consumer fraud law requires "injury in fact," "actual loss," "ascertainable: loss," or "actual injury," the case law in five of the six states demonstrates that the diminished value of a defective product satisfies this

requirement. *See Hall* v. *Time Inc.*, 70 Cal. Rptr. 3d 466, 471 (Cal. App. 2008) (recognizing that the unsatisfactory nature of a product or its diminished value are injuries in fact under California law); *In re Ford Motor Co. E-350 Van Products Liability Litigation (No. II)*, No. 03-4558,2008 WL 4126264, at *24-25 (D.N.J. 2008) (applying California law and finding that allegations of van's diminished value due to defect satisfy "injury in fact"); *Collins* v. *Daimler/Chrysler Corp.*, 894 So.2d 988, 990-91 (Fla. App. 2004) (holding that plaintiff possessed standing to assert statutory claim under FDUTPA for alleged economic damages based on latent seat belt defect and noting that "[i]n the context of FDUTPA, 'actual damage' have long been defined as the difference in the market value of the product or service in the condition in which it was delivered and its market value in the condition in which it should have been delivered according to the contract of the parties.") (quotation omitted); *In re General Motors Type III Door Latch Litigation*, No. 98 C 5836, 2001 WL 103434, at *3 (N.D. Ill. 2001) (noting that "[a]s a general rule, the Illinois Appellate Court has allowed product defect claims in the absence of product malfunction only when the damages claim stems from the diminished value of the defective product."); *Mayhall* v. *A.H. Pond Co., Inc.*, 341 N.W.2d 268, 271-72 (Mich. App. 1983) ("As the frustration of the plaintiffs expectations constitutes an injury for the purposes of proving common-law fraud, so too it constitutes a 'loss' under ... § 11 of the MCPA."); *Talalai* v. *Cooper Tire & Rubber Co.*, 823 A.2d 888, 898 (N.J. Super. Ct. 2001) (Under New Jersey law, "plaintiffs need only demonstrate an ascertainable loss-namely, an estimate of the price to replace the [defective product]"). Therefore, under the laws of these states, the common question of fact is whether the windows are defective. It is true that New York law requires that Plaintiffs prove actual injury. *Hubbard v. General Motors Corp.*, No. 95 Civ. 4362, 1996 WL 274018, at *3 (S.D.N.Y. May 22, 1996) ("Purchasers of an allegedly defective product have no legally recognizable claim where the alleged defect has not manifested itself in the product they own."). Although this may prove to be highly individualized, "the question of injury to individual class members is deferred until after resolution of the common

questions. ... If class certification were denied at this early stage on the basis that injury to individual class members would have to be proven on an individual basis, many classes might never be certified." *Elliott*, 150 F.R.D. at 575.

As far as reliance in cases of omission, individual reliance is not required or may be inferred from the purchase itself. *See Mass Mutual Life Ins. Co.* v. *Superior Court of San Diego County*, 97 Cal. App. 4th 1282, 1293, (Cal. App. 2002) (if plaintiffs succeed in proving allegations of a failure to disclose a material fact associated with the purchase of life insurance policies, "the purchases common to each class member would in turn be sufficient to give rise to the inference of common reliance on representations which were materially deficient."); *Turner Greenberg Associates, Inc.* v. *Pathman*, 885 So.2d 1004, 1009 (Fla. App. 2004) ("a demonstration of reliance by an individual consumer is not necessary in the context of FDUTPA"). *Lipinski* v. *Martin J. Kelly Oldsmobile, Inc.*, 759 N.E.2d 66, 70 (Ill. App. 2001) ("it is not necessary ... to show actual reliance in order to state a valid claim based on an omission or concealment under the Consumer Fraud Act."); *Dix* v. *American Bankers Life Assur. Co. of Florida*, 415 N.W.2d 206, 209 (Mich. 1987) ("We hold that members of a class proceeding under the Consumer Protection Act need not individually prove reliance on the alleged misrepresentations."); *International Union of Operating Engineers Local No. 68 Welfare Fund v. Merck & Co., Inc.*, 929 A.2d 1076, 1086 (N.J. 2007) ("[NJ CFA] essentially replaces reliance, an element of proof traditional to any fraud claim, with the requirement that plaintiff prove ascertainable loss."); *Stutman v. Chemical Bank*, 731 N.E.2d 608, 612 (N.Y. 2000)("reliance is not an element of a [statutory consumer protection] claim.")

Five states require a showing of causation. *See* Fla. Sta. § 501.211(2) (to recover damages, plaintiff must show that loss was a result of the violation); *Avery v. State Farm Mut. Auto Ins. Co.*, 835 N.E.2d 801,861 (Ill. 2005) ("Proximate causation is an element of all private causes of action under the Act."); *Gasperoni*, 2000 WL 33365948, at *7 ("reliance and causation are satisfied by proof that plaintiffs purchased and consumed

the product"); *Cox v. Sears Roebuck & Co.*, 647 A.2d 454, 464-65 (N.J. 1994) ("The 'causation' provision of [N.J. Consumer Fraud Act] requires plaintiff to prove that the unlawful consumer fraud caused his loss."); *Stutman v. Chemical Bank*, 731 N.E.2d at 611 (a plaintiff under NYCFA must prove "that the plaintiff suffered injury as a result of the deceptive act.")

In all of the states, the omission of a material fact is actionable, however, in California, an action may be brought only where there is a duty to disclose. Such a duty arises "when the defendant actively conceals a material fact from the plaintiff." *Falk v. General Motors Corp.*, 496 F. Supp. 2d 1088, 1097 (N.D. Cal. 2007).

Five of the states' laws employ an objective, reasonable consumer standard to determine whether the omission in dispute is material. The standard in Michigan is different. There, an omission is reasonable "only if the omitted fact could not reasonably be known by consumer," *Zine v. Chrysler*, 600 N.W.2d 384, 398 (Mich. App. 1999), which is also an objective standard.

Four states do not require scienter, however two have some form of scienter requirement. In Illinois, plaintiffs must show that defendant intended that they rely on the deception. *Miller v. William Chevrolet/GEO, Inc.*, 762 N.E.2d 1, 14 (Ill. App. 2001). This requires defendants to have prior knowledge of the information that they are alleged to have suppressed. *Id.* Under Michigan law, plaintiffs must prove defendant's intent to deceive, *Clement-Rowe v. Michigan Health Care Corp.*, 538 N.W.2d 20, 23 (Mich. App., 1995); *see Zine*, 600 N.W.2d at 398 ("it is proper to construe the provisions of the MCPA with reference to the common-law tort of fraud.") (internal quotations removed). However this may be done on a representative basis, making it appropriate for class treatment. *Gasperoni*, 2000 WL 33365948, at *7. New Jersey law does not require an intent to deceive per se, but does require proof that Defendant acted knowingly in making the omission. *Strawn v. Canuso*, 657 A.2d 420, 429 (N.J. 1995) (superseded on other grounds by N.J.S.A. 46:3C-1 to -12).

Committee, "[w]here a class is found to include subclasses divergent in interest, the class may be divided correspondingly, and each subclass treated as a class." Fed. R. Civ. P. 23(c)(4) advisory committee's note (1966). *Calkins v. Fidelity Bond & Mortg. Co.*, No. 94C5971, 1998 WL 719569, at *3 (N.D. Ill. Oct. 8, 1998) (creating state subclasses to avoid conflicts of law); MANUAL FOR COMPLEX LITIGATION (FOURTH) §22.634, p. 412 (2004) (noting the option of creating subclasses if the law of only a few jurisdictions applies).

While there are differences in the standing requirements of each state, as discussed supra, the Seventh Circuit has held that class certification should normally precede Article III standing challenges. *Payton* 308 F.3d. at 680, 682. Furthermore, this court has already denied Defendant's Motion to Dismiss and rejected arguments about the insufficiency of Plaintiffs CFA allegations, including whether they state claims for relief. Therefore, because the class may be divided into individual state subclasses where any conflict exists, and because standing of class members as a whole is not appropriately addressed at this time, Defendants' arguments with regard to predominance do not defeat class certification under Rule 23(b)(3).

Second, Defendants maintain that Illinois' borrowing statute requires that the court apply both

---

None of the states' laws require privity.

Despite the differences in state law, it is clear that there are significant questions of fact common to the class with regard to liability and the proposed declaratory judgment.

the Illinois statute of limitations and that of the state supplying the substantive law to determine which is shorter. Accrual and tolling vary by state and therefore an individual determination is required. Plaintiffs, however, note that this Court has rejected the per se prohibition against certification based upon statute of limitations differences on which Pella is insisting. When confronted with this issue in *Sparano* v. *Southland Corp.*, No. 94 C 2098, 1996 WL 681273, at *4 (N.D. Ill., Nov. 21, 1996) this Court stated:

> Defendants claim that the differing state laws regarding statute of limitations and punitive damages will predominate over the common questions. However, the presence of unresolved individual issues of compliance with the statute of limitations does not prevent class actions from proceeding. *Stieberger* v. *Sullivan*, 738 F. Supp. 716, 727 (S.D.N.Y. 1990). Any individual issues dealing with different states' statute of limitations and punitive damage laws can be handled by creating subclasses. Rule 23(b)(3) is therefore satisfied.

*See In re Linerboard Antitrust Litig.*, 305 F.3d 145, 162 (3d Cir. 2002) ("As long as a sufficient constellation of common issues binds class members together, variations in the sources and application of statutes of limitations will not automatically foreclose class certification under Rule 23(b)(3)."). Due to the predominance of other issues, differences in applicable statutes of limitations do not bar class certification under Rule 23(b)(3).

Next, Defendants once again raise the issue of causation, arguing that states have unique standards for causation and that individualized inquiries will be required to determine causation of the damage in cases of manifest wood rot (i.e. poor installation). According to Plaintiffs, the fact of damage can be identified through photographic evidence, and there is no need for individual depositions or inspection. Plaintiffs propose photo self-identification with opportunity for follow-up inspection. *See Pelletz*, 2009 WL 59126, at *5. Pella currently permits photographic evidence in its warranty process and does not always make physical inspection when dealing with warranty claims. While this may be the case, even Plaintiffs' expert has noted that improper installation, and other factors apart from any defect, may lead to water infiltration around some of the windows, as well as sheet rock damage. (Still Dep. at 80:19-82:8 and 26:15-27:8). It is clear that in many instances, inspection will be required, and individual inquiries will predominate. However, the fact that proving damages must be handled individually does not preclude certification on the issue of liability. *Allen* v. *International Truck and Engine Corp.*, 358 F.3d 469, 472 (7th Cir. 2004). ALBA CONTE & HERBERT NEWBERG, NEWBERG ON CLASS ACTIONS § 3.12 at 315 (4th ed. 2002).[13]

---

[13] Defendants point to *Pappas v. Pella Corp.*, No 06 L 12771, Order, Circuit Court of Cook County, Illinois, Aug. 21, 2007, at 5, in which the court denied class certification on a similar set of claims and facts, based on predominance. The court found that "there exists such potential vast differences in

Defendants point to *In the Matter of Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1017 & n.1 (7th Cir. 2002) for the proposition that latent defect members and manifest defect members should not recover along side one another. The court in *Bridgestone* noted that a mixed system, compensating buyers for the risk of a latent defect and buyers who have a manifest defect over compensates buyers and may lead to excess precaution by the manufacturer. *Id.* However, in this case, class members whose defect has not yet manifested are included in the damages class. Only those class members who have experienced a manifest defect and have paid to repair or replace these windows may be entitled to damages. Those class members whose windows have not manifested any defect may be entitled to declaratory and injunctive relief. Only once their windows experience any manifest defect, if indeed they ever do, then those members will be able to submit a claim to Pella for repair. There is no side-by-side recovery here.

Finally, I must address the propriety of an unjust enrichment class. A successful unjust enrichment

---

choice of action, type of claimed injury, and especially, the varied causal connections between the claimed injuries and the claimed reason thereof." In that case, Plaintiffs had initially brought and abandoned a breach of warranty claim. The court expressed concern regarding the potential for other class members to bring such a claim in the future. This is not the case here. *See supra*, section II.2.c. Furthermore, I agree that issues of causation are too individualized for class certification, and I have declined to certify a class on that issue.

claim requires proof of three elements: "(1) a benefit conferred on the defendant by the plaintiff; (2) an appreciation or knowledge by the defendant of the benefit; and (3) the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without payment of its value. The Restatement of Restitution provides that a person who has been unjustly enriched at the expense of another is required to make restitution to the other." 26 WILLISTON ON CONTRACTS § 68:5 (4th ed. 2009). "Damages differs from restitution in that damages is measured by the plaintiffs loss; restitution is measured by the defendant's unjust gain." 1 D. DOBBS, REMEDIES § 3.1, at 278 (2d ed. 1993). In this instance, restitution is the price paid by the consumer for the window, minus the diminished value of the window. This value is simply too difficult to quantify, especially on a class-wide basis. Windows are typically part of a larger structure, and many factors play a role in determining the valuation of that structure. Typically, individual pieces of the larger whole are not valued separately, but are rather one piece of the structure. This determination is too difficult to standardize fairly, and individualized issues would certainly dominate. For this reason, I decline to certify an unjust enrichment class.

**2. Superiority**

Defendants argue that based on the following three reasons, a class action is not the superior method for adjudicating the controversy: (1) individualized issues make it unmanageable;

(2) Seventh Amendment issues; (3) notice is problematic and not all members will be identified.

As discussed supra, neither individualized issues nor notice issues makes class certification unmanageable, and I need not address the issues further here. Defendants further claim that they will insist on their Seventh Amendment right to a jury trial and will not relinquish their right to proof of injury. However, "the question of injury to individual class members is deferred until after resolution of the common questions. ... If class certification were denied at this early stage on the basis that injury to individual class members would have to be proven on an individual basis, many classes might never be certified." *Elliott,* 150 F.R.D. at 575. Because I am certifying the consumer fraud class as to the issue of liability only, and damages will be handled individually, issues will not be overlapping, and the same issue will not be reexamined by different juries. *See In re Rhone-Poulenc Rorer Inc.,* 51 F.3d 1293, 1303 (7th Cir. 1995) ("[T]he judge must not divide issues between separate trials in such a way that the same issue is reexamined by different juries."). Because common issues of law and fact predominate, and trying these claims separately would result in a substantial amount of repetition, I find that proceeding as a class action is the superior form of adjudication for this case.

## III. CONCLUSION

For the foregoing reasons, I grant, in part, Plaintiffs' Motion for Class Certification, certifying the following classes: (1) a Rule 23(b)(2) declaratory judgment class for all class members whose windows

have not manifested the alleged defect and whose windows have some wood rot but have not yet been replaced; and (2) a Rule 23(b)(3) statutory consumer fraud class, consisting of the following six state subclasses: California, Florida, Illinois, Michigan, New Jersey, and New York, for all members whose windows have exhibited wood rot and who have replaced the affected windows. I deny Plaintiffs' motion to certify an unjust enrichment class.

ENTER:

/s/
James B. Zagel
United States District Judge

DATE: June 4, 2009

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DR. LEONARD E. SALTZMAN, KENT EUBANK, THOMAS RIVA, LUBO and MAIRA HADJIPPETKOV, WILLIAM and NANCY EHORN, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

PELLA CORPORATION, an Iowa corporation, and PELLA WINDOWS AND DOORS, INC., a Delaware corporation,

Defendants.

No. 06 C 4481
Judge James B. Zagel

**FIRST AMENDED CLASS ACTION COMPLAINT**

Plaintiffs Dr. Leonard E. Saltzman, Kent Eubank, Thomas Riva, Lubo and Maria Hadjipetkov, and William and Nancy Ehorn, individually and on behalf of all others similarly situated, allege as and for their Class Action Complaint against defendants Pella Corporation and Pella Windows and Doors, Inc. (collectively "Pella" or "Defendants"), upon personal knowledge as to themselves and their own acts, and as to all other matters upon information and belief,

based upon, *inter alia*, the investigation made by their attorneys, as follows:

## INTRODUCTION

1. This is a proposed class action brought by Plaintiffs on behalf of themselves and other consumers of Pella brand windows and doors (collectively, "Pella windows"), as defined more fully herein. Plaintiffs and the proposed class are owners of structures that contain Pella aluminum-clad windows. Unknown to Plaintiffs and the Class, Pella aluminum-clad windows contain a latent defect that allows water to penetrate and leak behind the aluminum cladding, resulting in premature wood rot and other physical damage to both the window and main structure. Pella's acts and omissions in connection with its sale and delivery of these defective windows violate the consumer protection laws of the states of residence of Plaintiffs and the class, and constitute common law fraud, breach of implied warranty, unjust enrichment and declaratory relief as appropriate.

## PARTIES

2. *Dr. Leonard E. Saltzman.* Plaintiff Dr. Leonard E. Saltzman is a natural person and citizen of Illinois.

3. *Kent Eubank.* Plaintiff Kent Eubank is a natural person and citizen of Iowa.

4. *Thomas Riva.* Plaintiff Thomas Riva is a natural person and citizen of Florida.

5. *Lubo and Maria Hadjipetkov.* Plaintiffs Lubo and Maria Hadjipetkov are natural persons and citizens of New Jersey.

6. *William and Nancy Ehorn.* Plaintiffs William and Nancy Ehorn [are] natural persons and citizens of California.

7. *Pella Corporation.* Defendant Pella Corporation is a corporation organized under the laws of Iowa with its principal place of business in Pella, Iowa.

8. *Pella Windows and Doors, Inc.* Defendant Pella Windows and Doors, Inc., is a Delaware corporation with its principal place of business in Pella, Iowa.

## JURISDICTION AND VENUE

9. This Court has subject matter jurisdiction of the claims asserted herein pursuant to 28 U.S.C. §§ 1331 and 1332(d)(2)(A) in that the amount in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which members of the putative plaintiff class are citizens of States different from Defendants.

10. Venue is proper pursuant to 15 U.S.C. § 80b-14 and 28 U.S.C. § 1391. Defendants regularly transact and solicit business in this District.

## OVERVIEW

11. This case concerns Pella's failure to disclose to purchasers of its aluminum clad windows and doors (collectively, "Pella windows") that there was a substantial risk those windows would develop leaks because of the defect alleged herein, and that (a) the defect might not exhibit itself until after the warranty period expired, and that (b) if the latent defect did not exhibit itself until after the warranty expired, Pella was not committing to repair it.

12. In essence, Pella knew, prior to sale to Plaintiff and the Class that, for the indefinite future, there was a substantial risk that its aluminum clad windows would leak and would have wood rot. Nevertheless, Pella failed to disclose that risk and thereby deprived consumers of the opportunity to negotiate additional warranty coverage, negotiate a lower price to reflect the risk or simply avoid the risk altogether by purchasing a different manufacturer's windows. Thereafter, the undisclosed risk occurred—plaintiffs' windows (and thousand [*sic*] of others) have leaked—and Plaintiffs and the Class have been damaged in the amount it will cost, or they paid, to repair the condition.

13. U.S. consumers reasonably expect that their windows will not leak due to defective design and manufacturing processes, and U.S. consumers simply had no expectation that Pella's windows would leak.

14. Further, consumers reasonably expect that if Pella knew that it had an inherent defect problem with leaks developing:

(a) that a manufacturer such as Pella would make a disclosure to consumers if it determined there was a widespread leakage problem—i.e., that Pella would make a disclosure if it determined that the leakage risk was no longer insubstantial;

(b) that a manufacturer such as Pella would repair the latent defect—even if the defect did not exhibit itself until after the warranty period expired—because the potential causes of the defect are within the control and responsibility of the manufacturer (not the consumer).

## PELLA'S CONDUCT WITH RESPECT TO THE WIDESPREAD LEAKAGE PROBLEM AT ISSUE HERE

15. Prior to Plaintiffs' purchases, if not before, Pella was aware that its windows contained an inherent defect that permitted leakage.

16. Pella knew (or but for its reckless indifference would have known) that it was receiving and was going to continue [to] receive reports of leakage. Based on its leakage experience, Pella also knew that even if it diligently investigated its widespread problem, it could take years to: (a) determine why the problem had developed, (b) conclude what steps should be taken to solve the problem, and then (c) implement those fixes.

17. Thus, Pella knew (or but for its reckless indifference would have known) that for the indefinite future: (a) the risk of leakage was substantial, (b) Pella's customers were unaware of that substantial risk, and (c) those customers had a reasonable expectation that Pella would disclose that risk and cure the latent defect, even if the defect (leakage) did not exhibit itself until after the warranty period had expired.

18. Despite such knowledge, Pella did not disclose to prospective purchasers that: (a) there was a substantial risk [their] windows would manifest the defect (leaks), (b) the defect might not exhibit itself until after the warranty expired, and that (c) if the latent defect did not exhibit itself until after the warranty expired, Pella was not committing to repair it.

19. Furthermore, when questioned about leakage problems, Pella would claim faulty installation as the culprit, or would deny claims as "out of warranty" without disclosing the defect.

20. On information and belief, in an attempt to correct the defect, Pella recently changed the way it applies glue sealant to the window's sash line. While the sealant had previously been manually applied, in or about April 2006, Pella purchased a machine that now applies the glue sealant.

21. On information and belief, in an attempt to correct the defect, Pella recently changed the sealant applied to the wood behind the aluminum cladding. The previous wood sealant had failed to protect the wood when exposed to moisture from leaking.

## NAMED PLAINTIFFS' ALLEGATIONS

22. **Dr. Leonard Saltzman.** On or about August 31, 1995, Plaintiff purchased several Pella "ProLine" aluminum-clad wood windows for installation at his residence in Lake Forest, Illinois. The cost of the windows and installation was $29,846.03.

23. Pella aluminum-clad wood windows, unknown to Plaintiff, were defective in that they allowed water to penetrate the area behind the aluminum cladding, which ultimately caused condensation, wood rot, leaks and other failures.

24. The characteristics of the window defect (that allowed for the water to penetrate the aluminum cladding and failed to protect the wood from rot) were present in the windows when they left the factory, and were part of the window by design and manufacture.

25. In or about May, 2005, Plaintiff discovered water leaks, condensation, wood rot and other damage to the windows and main structure of his home.

26. Upon discovering the aforesaid damage, Plaintiff contacted Pella and requested repair or replacement of the windows at Pella's expense, which it refused on grounds that the windows were no longer under warranty. Pella further, as part of its scheme to defraud, attributed the damage to faulty installation.

27. The following are representative of the defect and damage:

**[PHOTOGRAPH NOT REPRODUCED]**

28. **Kent Eubank.** Plaintiff built his home in 1992, and had Pella "ProLine" aluminum-clad windows installed in his residence in West Des Moines, Iowa. The cost of the windows, not including installation of finishing of wood trim, was approximately $20,000.00.

29. Pella aluminum-clad wood windows, unknown to Plaintiff, were defective in that they allowed water to penetrate the area behind the aluminum cladding, which caused condensation, wood rot, leaks and other failures.

30. The characteristics of the window defect (that allowed for the water to penetrate the aluminum cladding and failed to protect the wood from rot) were present in the windows when they left the factory, and were part of the window by design and manufacture.

31. In 2001, Plaintiff contacted Pella to correct a few problems at Pella's expense, which it refused on

the grounds that the windows were no longer under warranty. Pella did put silicon caulk around the windows as a repair and charged Plaintiff for it.

32. In September 2006, Plaintiff discovered that several sashes had deteriorated, including one that had deteriorated to the point that the glass had fallen down about an inch behind the aluminum clad of the window.

33. Upon discovering the aforesaid damage, Plaintiff again contacted Pella and requested repair or replacement of the windows at Pella's expense, which it refused on grounds that the windows were no longer under warranty.

34. The following are representative of the defect and damage:

**[PHOTOGRAPH NOT REPRODUCED]**

35. **Thomas Riva.** Plaintiff built his home in 2001, and had Pella "Architect" and "ProLine" aluminum-clad windows installed in his residence in Sarasota, Florida. The cost of the windows and installation was approximately $20,000.

36. Pella aluminum-clad wood windows, unknown to Plaintiff, were defective in that they allowed water to penetrate the area behind the aluminum cladding, which caused condensation, wood rot, leaks and other failures.

37. The characteristics of the window defect (that allowed for the water to penetrate the aluminum cladding and failed to protect the wood from rot) were present in the windows when they left the factory, and were part of the window by design and manufacture.

38. In approximately 2004, Plaintiff discovered water leaks, condensation, wood rot and other damage to the windows and main structure of his home.

39. Upon discovering the aforesaid damage, Plaintiff contacted Pella and requested repair or replacement of the windows at Pella's expense, which it refused and required Plaintiff to pay $75.00 per window to measure and replace.

40. The following are representative of the defect and damage:

**[PHOTOGRAPH NOT REPRODUCED]**

41. **Lubo and Maria Hadjipetkov**. Plaintiffs added a second story to their home in 2003, and had Pella "Architect" aluminum-clad windows installed in their residence in Montclair, New Jersey. The cost of the windows and installation was in excess of $20,000.00.

42. Pella aluminum-clad wood windows, unknown to Plaintiffs, were defective in that they allowed water to penetrate the area behind the aluminum cladding, which caused condensation, wood rot, leaks and other failures.

43. The characteristics of the window defect (that allowed for the water to penetrate the aluminum cladding and failed to protect the wood from rot) were present in the windows when they left the factory, and were part of the window by design and manufacture.

44. In approximately late 2004, Plaintiffs, upon moving back into the house, discovered water leaks, condensation, and other damage to the windows and main structure of his home.

45. Upon discovering the aforesaid damage, Plaintiff contacted Pella and requested repair or replacement of the windows at Pella's expense, which it refused and told Plaintiffs that the leaks were due to improper installation and improper maintenance.

46. The following are representative of the defect and damage:

**[PHOTOGRAPH NOT REPRODUCED]**

47. **William and Nancy Ehorn.** In October 1990, Plaintiffs installed Pella Architect Series windows in their home in Smith River, California.

48. Pella aluminum-clad wood windows, unknown to Plaintiffs, were defective in that they allowed water to penetrate the area behind the aluminum cladding, which caused condensation, wood rot, leaks and other failures.

49. The characteristics of the window defect (that allowed for the water to penetrate the aluminum cladding and failed to protect the wood from rot) were present in the windows when they left the factory, and were part of the window by design and manufacture.

50. Plaintiffs have water leaks, condensation, wood rot and other damage to the windows and main structure of [their] home.

51. Beginning in January 1992, and continuing to the present, Plaintiffs have contacted Pella and requested repair or replacement of the windows at Pella's expense, which it refused and told Plaintiffs that the leaks were due to improper installation and improper maintenance.

52. The following are representative of the defect and damage:

**[PHOTOGRAPH NOT REPRODUCED]**

53. The latent defect described herein is found on Pella's ProLine, Architect Series and Designer Series aluminum-clad windows. With respect to the defect at issue, these aluminum-clad wood windows share the same design characteristics and manufacturing methods. The design characteristics and manufacturing methods used by Pella to produce aluminum-clad wood windows resulted in the damages caused Plaintiff and the class.

54. The latent defect at issue here is a necessary cause of the water leaks and resulting wood rot and damage; the presence of water leaks and the resulting wood rot and other damages necessarily implies that the latent defect preceded it. The presence of the latent defect, however, does not imply that water leaks and the resulting wood rot and damage will occur.

## CLASS ACTION ALLEGATIONS

55. Plaintiffs bring all claims herein as class claims pursuant to Fed. R. Civ. P. 23. The requirements of Fed. R. Civ. P. 23(a), (b)(2) and (b)(3) are met with respect to the class defined below.

### A. Class Definition(s)

56. The (b)(2) Injunctive Relief Class consists of:

> All persons who own a structure with Pella ProLine, Architect Series and Designer

Series aluminum-clad windows and doors (the "Class").[1]

57. The (b)(3) State Sub-Classes consist of:

**Illinois:** All persons who own a structure, on property located in Illinois, with Pella ProLine, Architect Series and Designer Series aluminum-clad windows and doors (the "Illinois Sub-Class");

**Iowa:** All persons who own a structure, on property located in Iowa, with Pella ProLine, Architect Series and Designer Series aluminum-clad windows and doors (the "Iowa Sub-Class"); and

**Florida:** All persons who own a structure, on property located in Florida, with Pella ProLine, Architect Series and Designer Series aluminum-clad windows and doors (the "Florida Sub-Class").

**New Jersey:** All persons who own a structure, on property located in New Jersey, with Pella ProLine, Architect Series and Designer Series aluminum-clad windows and doors (the "New Jersey Sub-Class").

**California:** All persons who own a structure, on property located in California, with Pella ProLine, Architect Series and

---

[1] Plaintiff reserves the right to amend the class definition based upon future investigation, discovery and the proofs at trial.

Designer Series aluminum-clad windows and doors (the "California Sub-Class").

**Texas:** All persons who own a structure, on property located in Texas, with Pella ProLine, Architect Series and Designer Series aluminum-clad windows and doors (the "Texas Sub-Class").

**New York:** All persons who own a structure, on property located in New York, with Pella ProLine, Architect Series and Designer Series aluminum-clad windows and doors (the "New York Sub-Class").

**Ohio:** All persons who own a structure, on property located in Ohio, with Pella ProLine, Architect Series and Designer Series aluminum-clad windows and doors (the "Ohio Sub-Class").

**Michigan:** All persons who own a structure, on property located in Michigan, with Pella ProLine, Architect Series and Designer Series aluminum-clad windows and doors (the "Michigan Sub-Class").

**North Carolina:** All persons who own a structure, on property located in North Carolina, with Pella ProLine, Architect Series and Designer Series aluminum-clad windows and doors (the "North Carolina Sub-Class").

Excluded from the Class(es) are: Defendants, any entities in which they have a controlling interest, any of their parents, subsidiaries, affiliates, officers, directors, employees and members of such persons

immediate families, and the presiding judge(s) in this case and his, her or their immediate family.

**B. Numerosity**

58. At this time, Plaintiffs do not know the exact size of the Class; however, due to the nature of the trade and commerce involved, Plaintiffs believe that the Class members are so numerous that joinder of all members is impracticable. The number and identities of Class members is administratively feasible and can be determined through appropriate discovery.

**C. Commonality**

59. There are questions of law or fact common to the class, including at least the following:

(a) Whether Pella aluminum clad windows and doors contain the latent defect alleged herein;

(b) Whether the complained of defect caused the damages of Plaintiffs and other members of the Class;

(c) Whether the latent defect is a necessary cause of the water leaks and resulting wood rot and damage;

(d) Whether Defendants had actual or imputed knowledge of the defect but failed to disclose it to Plaintiffs or the Class;

(e) Whether Defendants have a pattern and practice of attributing damages claimed by Plaintiffs and the Class to "faulty installation" or improper maintenance, and not due to the complained of defect;

(f) Whether Defendants have a pattern and practice of denying Plaintiffs' and the Class' claims as 'out of warranty', and not due to the complained of defect;

(g) Whether Defendants have acted or refused to act on grounds generally applicable to the Class;

(h) Whether Defendants' conduct constitutes consumer fraud and/or common law fraud;

(i) Whether Defendants were unjustly enriched by their conduct;

(j) Whether Plaintiffs and other members of the Class have been damaged, and if so, what is the proper measure of such damages?

**D. Typicality**

60. Plaintiff has the same interests in this matter as all other members of the Class, and his claims are typical of all members of the class.

**E. Adequacy**

61. Plaintiffs are committed to pursuing this action and have retained competent counsel experienced in the prosecution and successful resolution of consumer class actions. Plaintiffs will fairly and adequately represent the interests of the Class members and do not have interests adverse to the Class.

**F. The Prerequisites of Rule 23(b)(2) are Satisfied**

62. The prerequisites to maintaining a class action for injunctive and equitable relief pursuant to

Fed. R. Civ. P. 23(b)(2) exist as Defendants have acted or refused to act on grounds generally applicable to the Class thereby making appropriate final injunctive and equitable relief with respect to the Class as a whole.

63. The prosecution of separate actions by members of the class would create a risk of establishing incompatible standards of conduct for Defendants. For example, one court might decide that the challenged actions are illegal and enjoin them, while another court might decide that those same actions are not illegal. Individual actions may, as a practical matter, be dispositive of the interest of Class members, who would not be parties to those actions.

64. Defendants' actions are generally applicable to the Class as a whole, and Plaintiffs seek, *inter alia*, equitable remedies with respect to the class as a whole.

65. Defendants' systemic policy and practices make declaratory relief with respect to the class as a whole appropriate.

**G. The Prerequisites of Rule 23(b)(3) are Satisfied**

66. This case satisfies the prerequisites of Fed. R. Civ. P. 23(b)(3). The common questions of law and fact enumerated above predominate over questions affecting only individual members of the Class, and a class action is the superior method for fair and efficient adjudication of the controversy. The likelihood that individual members of the Class will prosecute separate actions is remote due to the extensive time and considerable expense necessary

to conduct such litigation, especially when compared to the relatively modest amount of monetary, injunctive and equitable relief at issue for each individual Class member. This action will be prosecuted in a fashion to ensure the Court's able management of this case as a class action on behalf of the class defined above.

**FRAUDULENT CONCEALMENT**

67. Throughout the Class period, Defendants affirmatively concealed from Plaintiffs and Class the defect described herein.

68. Defendants had a duty to inform Plaintiffs and Class of the defect described herein, which it knew of or should have known. Notwithstanding their duty, Defendants never disclosed the defects to Plaintiffs or the Class; rather, Defendants attributed resulting damage to faulty installation, maintenance or other third-party conduct.

69. Despite exercising reasonable diligence, Plaintiffs and Class could not have discovered the defects or Defendants' scheme to avoid disclosure of the defect. Thus, running of the statute of limitations has been tolled with respect to any claims that Plaintiffs or the Class have brought or could have brought as a result of the unlawful and fraudulent course of conduct described herein.

70. Defendants are further estopped from asserting any statute of limitations defense, contractual or otherwise, to the claims alleged herein by virtue of its acts of fraudulent concealment.

## CAUSES OF ACTION

### COUNT I

### (Violation of Illinois Consumer Fraud and Deceptive Business Practices Act and Substantially Similar Laws of Certain Other States)

71. Plaintiffs repeat and reallege the allegations of the prior paragraphs as if fully stated herein.

72. At all times relevant hereto, there was in full force and effect the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 *et seq.* and substantially similar state consumer protection statutes (the "Act"). Similar statutes, identical in their material respects, are in effect in many jurisdictions within the United States.[2]

73. Section 2 of the Act provides in relevant part as follows:

> Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use of or employment of any

---

[2] The consumer fraud claims of Plaintiff and resident absent class members is brought under the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 *et seq.* The consumer fraud claims of nonresident absent class members are brought under the consumer protection statute(s) of their respective states of residence. *See e.g.*, Cal. Bus. & Prof. Code § 17200 *et seq.*, and Cal. Bus. & Prof. Code § 17500 *et seq.* (California); Fla. Stat. Ann. § 501.201 *et seq.* (Florida); Mich. Stat. Ann. § 19.418(1) *et seq.* (Michigan); N.J. Rev. Stat. § 56:8-1 *et seq.*, N.J. Rev. Stat. § 56:12-1 *et seq.* (New Jersey); N.Y. Gen. Bus. Law. § 349 *et seq.* (New York); N.C. Gen. Stat. § 75-1 *et seq.* (North Carolina).

> deceptive, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the use of employment of any practice described in Section 2 of the "Uniform Deceptive Trade Practices Act," approved August 5, 1965, in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby. In construing this section consideration shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a) of the Federal Trade Commission Act.

815 ILCS 505/2 (footnotes omitted).

74. Plaintiffs and other Class members are consumers within the meaning of Consumer Fraud Acts given that Defendants' business activities involve trade or commerce, are addressed to the market generally and otherwise implicate consumer protection concerns.

75. Section 2 of the Illinois Consumer Fraud Act, 815 ILCS 505/2, renders unlawful the "use or employment of any deception [including the] concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact ... in the conduct of any trade or commerce ..." Illinois case law holds that reliance on the deception is not an element of a consumer fraud claim.

76. Except as noted below, the consumer fraud statutes and/or interpretative case law of Illinois' sister states have also either: (a) expressly prohibited omissions of material fact, without regard for reliance on the deception, or (b) have not addressed those issues.

77. Once the defect's risk became significant, consumers (such as Plaintiffs) were entitled to disclosure of that fact because:

(a) A significant risk of leakage would be a material fact in a consumer's decision-making process, and

(b) Without Pella's disclosure, consumers would not know that there is any risk of leakage.

78. Moreover, because Pella's warranties are limited in duration, consumers were further entitled to know that leakage might not exhibit itself until after their warranties expired, and if that occurred, Pella was not committing to repair the condition. All of these facts were material to consumers' (such as Plaintiffs') purchase decisions.

79. Specifically, at all times relevant, Pella continuously and consistently failed to disclose to consumers (such as Plaintiffs):

(a) there was a substantial risk of leakage or wood rot;

(b) that leakage or wood rot may not exhibit itself until after the warranty has expired; and

(c) that if leakage or wood rot exhibited itself after the warranty period expired Pella was

not committing to repair the condition. Pella failed to make these disclosures despite opportunities through its employees, sales literature, advertising and its website.

80. Pella intended that Plaintiffs and the Class would rely on the deception by purchasing its windows, unaware of the material facts described above. This conduct constitutes consumer fraud within the meaning of the various consumer protection statutes.

81. Plaintiffs and the Class have been damaged by Pella's deception because: (a) they purchased Pella windows that developed the undisclosed risk/defect—leakage and wood rot, (b) in many instances the condition exhibited itself after Plaintiffs' warranty period expired, and (c) Pella refused to pay to repair the condition because the warranty had expired.

82. If Pella had disclosed the above facts to Plaintiffs, they could have (and would have) prevented economic injury by either negotiating additional warranty coverage, negotiating a lower price to reflect risk or simply avoiding the risk altogether by purchasing a different manufacturer's windows.

83. Defendants have committed deceptive acts or practices within the meaning of the Act by engaging in the acts and practices alleged herein, including, but not limited to, its failure to disclose the material defects.

84. Defendants' conduct alleged herein is furthermore unfair insofar as it offends public policy;

is so oppressive that the consumer has little alternative but to submit; and causes consumers substantial injury.

85. As a direct and proximate result of the unfair acts or practices of Defendants alleged herein, Plaintiffs and other members of the Class were damaged.

**WHEREFORE,** Plaintiffs, individually and on behalf of the Class of persons described herein, pray for an Order as follows:

A. Finding that this action satisfies the prerequisites for maintenance as a class action set forth in Fed. R. Civ. P. 23(a), (b)(2) and/or (b)(3), and certifying the Class defined herein;

B. Designating Plaintiffs as representatives of the Class and their counsel as Class counsel;

C. Entering judgment in favor [of] Plaintiffs and the Class and against Defendants;

D. Awarding Plaintiffs and Class members their individual damages and attorneys' fees and allowing costs, including interest thereon;

E. Compelling Defendants to establish a program to inspect, replace and install defective Pella windows;

F. Compelling Defendants to establish a program to reimburse its warranty claims previously denied or paid in part, reimburse Pella customers who have had to pay to repair and/or replace defective Pella windows; and

G. Granting such further relief as the Court deems just

## COUNT II

### (Violation of Similar Uniform Deceptive Trade Practices Acts)

86. Plaintiffs repeat and reallege the allegations of the prior paragraphs as if fully stated herein.

87. At all times relevant hereto, there was in full force and effect the Uniform Deceptive Trade Practices Act ("UDTPA"), 815 ILCS 510/1. Similar statutes, identical in their material respects, are in effect in many jurisdictions within the United States.[3]

88. The UDTPA prohibits, *inter alia*, representing that goods have characteristics, ingredients, uses, or benefits that they do not have. 815 ILCS 510/2(5).

89. Specifically, at all times relevant, Pella continuously and consistently represented to the marketplace that:

(a) Pella windows were durable;

(b) Pella windows were manufactured to high quality standards;

---

[3] *See e.g.*, Fla. Stat. Ann. § 501.204(1) *et seq.* (Florida); Iowa Code § 714.16.2(a) *et seq.* (Iowa); N.J. Rev. Stat. § 56:8-2 *et seq.*; (New Jersey); Colo. Rev. Stat. § 6-1-101 *et seq.* (Colorado); Del. Code Ann. Tit. 6, § 2513 *et seq.* (Delaware); Ga. Code Ann. § 10-1-393(a) *et seq.* (Georgia); Me. Rev. Stat. Ann. Tit. 5, § 207 *et seq.* (Maine); Minn. Stat. § 325D.44 *et seq.* (Minnesota); N.M. Stat. Ann. § 57-12-3 *et seq.* (New Mexico); Ohio Rev. Code Ann. § 1345.02(a) *et seq.* (Ohio); Or. Rev. Stat. § 646.605 *et seq.* (Oregon).

(c) Pella windows were maintenance free; . and

(d) Pella would stand behind its products.

90. Defendants have committed deceptive acts or practices within the meaning of UDTPA by engaging in the acts and practices alleged herein, including, but not limited to, its failure to disclose the material defects.

91. As a result of Defendants' violation of UDTPA, Plaintiffs and other members of the Class sustained loss or damages and are entitled to equitable relief.

92. Plaintiffs seek relief including compelling Defendants to establish a program to inspect, replace and install defective Pella windows; and compelling Defendants to establish a program to reimburse its warranty claims previously denied or paid in part, reimburse Pella customers who have had to pay to repair and/or replace defective Pella windows.

**WHEREFORE,** Plaintiffs, individually and on behalf of the Class of persons described herein, pray for an Order as follows:

A. Finding that this action satisfies the prerequisites for maintenance as a class action set forth in Fed. R. Civ. P. 23(a), (b)(2) and/or (b)(3), and certifying the Class defined herein;

B. Designating Plaintiffs as representatives of the Class and their counsel as Class counsel;

C. Entering judgment in favor [of] Plaintiffs and the Class and against Defendants;

D. Awarding Plaintiffs and Class members their attorneys' fees and allowing costs, including interest thereon;

E. Compelling Defendants to establish a program to inspect, replace and install defective Pella windows;

F. Compelling Defendants to establish a program to reimburse its warranty claims previously denied or paid in part, reimburse Pella customers who have had to pay to repair and/or replace defective Pella windows; and

G. Granting such further relief as the Court deems just.

**COUNT III**

**(Common Law Fraud by Omission)**

93. Plaintiffs repeat and reallege the allegations of the prior paragraphs, as if fully stated herein.

94. Pella, through its experience, was in a position of superiority over Plaintiffs and class members with respect to knowledge that: (a) there was a substantial risk that its windows would develop leaks and wood rot, (b) the defect might not exhibit itself until after the warranty period expired, and that (c) Pella was not committing to repair the latent defect if it exhibited itself after the warranty period expired.

95. In other words, once the risk of the leaks became significant, consumers (such as Plaintiffs) were entitled to disclosure of that fact because:

(a) A significant risk of window leakage would be a material fact in a consumer's decision-making process; and

(b) without Pella's disclosure, consumers would not know that there is any risk of leakage.

96. Moreover, because Pella's warranties are limited in duration, consumers were further entitled to know that leakage might not exhibit itself until after their warranties expire, and if that occurred, Pella was not committing to repair the condition. All of these facts were material to consumers' (such as Plaintiffs') purchase decisions.

97. Specifically, at all times relevant, Pella continuously and consistently failed to disclose to consumers (such as Plaintiffs):

(a) there was a substantial risk of leakage or wood rot;

(b) that leakage or wood rot may not exhibit itself until after the warranty has expired; and

(c) that if leakage or wood rot exhibited itself after the warranty period expired Pella was not committing to repair the condition.

Pella failed to make these disclosures despite opportunities through its employees, sales literature, advertising and its website.

98. Plaintiffs and the Class reasonably relied on Pella to disclose those material facts.

If Pella had disclosed the above facts to Plaintiffs and the Class, they could have (and would have) prevented economic injury by either negotiating additional warranty coverage, negotiating a lower

price to reflect the risk or simply avoiding the risk by purchasing a different manufacturer's windows.

99. Pella failed to disclose those material facts and, as a proximate result, Plaintiffs and the Class have been damaged because: (a) they purchased Pella windows that developed the undisclosed risk – leakage, (b) the condition exhibited itself after Plaintiffs' warranty period expired, and (c) Pella refused to repair the condition because the warranties had expired.

**WHEREFORE,** Plaintiffs, individually and on behalf of the Class of persons described herein, pray for an Order as follows:

A. Finding that this action satisfies the prerequisites for maintenance as a class action set forth in Fed. R. Civ. P. 23(a), (b)(2) and/or (b)(3), and certifying the Class defined herein;

B. Designating Plaintiffs as representatives of the Class and their counsel as Class counsel;

C. Entering judgment in favor [of] Plaintiffs and the Class and against Defendants;

D. Awarding Plaintiffs and Class members their individual damages and attorneys' fees and allowing costs, including interest thereon;

E. Imposing a constructive trust on amounts wrongfully collected from Plaintiffs and the Class members pending resolution of their claims herein;

F. Compelling Defendants to establish a program to inspect, replace and install defective Pella windows;

G. Compelling Defendants to establish a program to reimburse its warranty claims previously denied or paid in part, reimburse Pella customers who have had to pay to repair and/or replace defective Pella windows; and

H. Granting such further relief as the Court deems just.

## COUNT IV

### (Breach of Implied Warranty of Merchantability)

100. Plaintiffs repeat and reallege the allegations of the prior paragraphs as if fully stated herein.

101. The Pella windows installed in structures owned by Plaintiffs and the Class were defectively made, having left Defendants' manufacturing facilities with the latent defect.

102. At all times relevant hereto, there was duty imposed by law which requires that a manufacturer or seller's product be reasonably fit for the purposes for which such products are used, and that product be acceptable in trade for the product description.

103. Notwithstanding the aforementioned duty, at the time of delivery, Pella aluminum-clad windows sold to Plaintiffs and the Class were not merchantable.

104. As documented in its own business records and elsewhere, Defendants were notified that its aluminum-clad windows were not merchantable with a reasonable time after the latent defect manifested itself to Plaintiffs and the Class.

105. As a result of the non-merchantability of the Pella aluminum-clad windows described herein,

Plaintiffs and other members of the Class sustained a loss or damages.

**WHEREFORE,** Plaintiffs, individually and on behalf of the Class of persons described herein, pray for an Order as follows:

A. Finding that this action satisfies the prerequisites for maintenance as a class action set forth in Fed. R. Civ. P. 23(a), (b)(2) and/or (b)(3), and certifying the Class defined herein;

B. Designating Plaintiffs as representatives of the Class and their counsel as Class counsel;

C. Entering judgment in favor [of] Plaintiffs and the Class and against Defendants;

D. Awarding Plaintiffs and Class members their individual damages and attorneys' fees and allowing costs, including interest thereon;

E. Imposing a constructive trust on amounts wrongfully collected from Plaintiffs and the Class members pending resolution of their claims herein;

F. Compelling Defendants to establish a program to inspect, replace and install defective Pella windows;

G. Compelling Defendants to establish a program to reimburse its warranty claims previously denied or paid in part, reimburse Pella customers who have had to pay to repair and/or replace defective Pella windows; and

H. Granting such further relief as the Court deems just.

## COUNT V

### (Unjust Enrichment)

106. Plaintiffs repeat and reallege the allegations of the prior paragraphs, as if fully stated herein.

107. The latent defects were a result of the design of the windows.

108. The latent defects did not exhibit themselves until after the warranty period had expired.

109. Plaintiffs and the Class have conferred benefits on Defendants by purchasing Pella windows.

110. Defendants have knowingly and willingly accepted these benefits from Plaintiffs and the Class.

111. Under the circumstances, it is inequitable for Defendants to retain these benefits at the expense of Plaintiffs and the Class.

112. Defendants have been unjustly enriched at the expense of and detriment of Plaintiffs and the Class by wrongfully collecting money to which Defendants, in equity, is not entitled.

113. Plaintiffs and the Class are entitled to recover from Defendants all amounts wrongfully collected and improperly retained by Defendants, plus interest thereon.

114. As a direct and proximate result of Defendants' unjust enrichment, Plaintiffs and the Class have suffered injury and are entitled to reimbursement, restitution and disgorgement from Defendants of the benefits conferred by Plaintiffs and the Class.

115. Plaintiffs and the Class have no adequate remedy at law.

116. Plaintiffs seek to obtain a pecuniary benefit for the Class in the form of all reimbursement, restitution and disgorgement from Defendants. Plaintiffs' counsel are entitled to recover their reasonable attorneys' fees and expenses as a result of the conference of a pecuniary benefit on behalf of the Class, and will seek an award of such fees and expenses at the appropriate time.

**WHEREFORE,** Plaintiffs, individually and on behalf of the Class of persons described herein, pray for an Order as follows:

A. Finding that this action satisfies the prerequisites for maintenance as a class action set forth in Fed. R. Civ. P. 23(a), (b)(2) and/or (b)(3), and certifying the Class defined herein;

B. Designating Plaintiffs as representatives of the Class and their counsel as Class counsel;

C. Entering judgment in favor [of] Plaintiffs and the Class and against Defendants;

D. Awarding Plaintiffs and Class members their individual damages and attorneys' fees and allowing costs, including interest thereon;

E. Imposing a constructive trust on amounts wrongfully collected from Plaintiffs and the Class members pending resolution of their claims herein;

F. Compelling Defendants to establish a program to inspect, replace and install defective Pella windows;

G. Compelling Defendants to establish a program to reimburse its warranty claims previously denied or paid in part, reimburse Pella

customers who have had to pay to repair and/or replace defective Pella windows; and

H. Granting such further relief as the Court deems just.

**COUNT VI**

**(Declaratory Relief Pursuant To 28 U.S.C. § 2201)**

117. Plaintiffs repeat and reallege the allegations of the prior paragraphs, as if fully stated herein.

118. There is an actual controversy between Pella and the Class concerning the validity of the time limitations in the warranty on Pella's windows, and concerning installation and maintenance defenses to otherwise valid warranty claims. A copy of Pella's warranty is attached as Exhibit 1.

119. Pursuant to 28 U.S.C. § 2201 this Court may "declare the rights and legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought."

120. Pella has wrongfully denied warranty claims as untimely or based on installation and maintenance defenses despite the root cause of leaks and wood rot being the latent defects described herein.

121. Accordingly, Plaintiffs seek a declaration that the Pella window warranties regarding the 10 year time limitations on manufacturing defects in material or workmanship are void, invalid and not enforceable.

**WHEREFORE,** Plaintiffs, individually and on behalf of the Class of persons described herein, pray for an Order as follows:

A. Finding that this action satisfies the prerequisites for maintenance as a class action set forth in Fed. R. Civ. P. 23(a), (b)(2) and/or (b)(3), and certifying the Declaratory Relief Class defined herein;

B. Designating Plaintiffs as representatives of the Class and their counsel as Class counsel;

C. Entering judgment in favor [of] Plaintiffs and the Class and against Defendants;

D. Awarding Plaintiffs and Class members their individual damages and attorneys' fees and allowing costs, including interest thereon;

E. Compelling Defendants to establish a program to inspect, replace and install defective Pella windows;

F. Compelling Defendants to establish a program to reimburse its warranty claims previously denied or paid in part, reimburse Pella customers who have had to pay to repair and/or replace defective Pella windows; and

G. Granting such further relief as the Court deems just.

**JURY DEMAND**

Plaintiffs demand a trial by jury on all issues so triable.

DATED: November 8, 2006

Respectfully submitted,

**DR. LEONARD E. SALTZMAN, et al.,**
**Class Plaintiffs,**

By: /s/ George K. Lang
One of Their Attorneys

Paul M. Weiss #6217260
Jonathan B. Piper #6196071
William M. Sweetnam #6226203
George K. Lang #6211537
**FREED & WEISS LLC**
111 West Washington Street, Suite 1331
Chicago, Illinois 60602
(312) 220-0000
Paul@freedweiss.com
Jon@freedweiss.com
BillS@freedweiss.com
George@freedweiss.com

Bradley M. Lakin
Charles Chapman
Richard J. Burke
**THE LAKIN LAW FIRM, P.C.**
301 Evans Avenue, P.O. Box 27
Wood River, Illinois 62095

Jonathan Shub
**SHELLER LUDWIG & SHELLER**
1528 Walnut Street, 3rd Floor
Philadelphia, PA 19102

**Counsel for Plaintiffs and**
**Proposed Plaintiff Classes**